(1)

No. 00-9285-CFH Title: Walter Mickens, Jr., Petitioner
v.
CAPITAL CASE - John Taylor, Warden

Docketed: April 5, 2001 Court: United States Court of Appeals for the Fourth Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Apr 5 2001 | Application (00A874) for a stay of execution, submitted to The Chief Justice. |
| | Apr 5 2001 | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due May 5, 2001) |
| | Apr 11 2001 | Brief of respondent in opposition filed. |
| | Apr 16 2001 | Application (00A874) referred to the Court by the Chief Justice. |
| | Apr 16 2001 | Application (00A874) granted by the Court. |
| | Apr 16 2001 | Petition GRANTED.<br>SET FOR ARGUMENT November 5, 2001.<br>********** |
| | Apr 16 2001 | The petition for a writ of certiorari is granted limited to the following question: Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violaton where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known? |
| | May 2 2001 | Order extending time to file petitioner's and respondent's briefs on the merits. The time for filing petitioner's brief on the merits has been extended to and including July 19, 2001. The for filing respondent's brief on the merits has been extended to and including September 4, 2001. |
| | May 29 2001 | Motion of petitioner for appointment of counsel filed. |
| | Jun 18 2001 | Motion DISTRIBUTED. June 21, 2001 (page 20) |
| | Jun 25 2001 | Motion for appointment of counsel GRANTED and it is ordered that Robert J. Wagner, Esquire, of Richmond, Virginia, is appointed to serve as counsel for the petitioner in this case. |
| | Jul 13 2001 | Joint appendix filed. |
| | Jul 13 2001 | Brief of petitioner Walter Mickens, Jr. filed. |
| | Jul 19 2001 | Motion of Legal Ethicists, et al. for leave to file a brief as amici curiae filed. |
| | Aug 15 2001 | LODGING consisting of 20 bound copies of related joint appendix material submitted by counsel for the parties. |
| | Aug 16 2001 | CIRCULATED. |
| | Aug 22 2001 | Record filed. |
| | Aug 24 2001 | Record filed. |
| | Aug 31 2001 | Brief amicus curiae of Criminal Justice Legal Foundation filed. |
| | Sep 4 2001 | Brief amicus curiae of United States filed. |
| | Sep 4 2001 | Brief of respondent John B. Taylor, Warden filed. |
| | Sep 4 2001 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided |

2 pp

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | | argument filed. |
| | Sep 17 2001 | Reply brief of petitioner Walter Mickens, Jr. filed. |
| | Sep 24 2001 | Motion of Legal Ethicists, et al. for leave to file a brief as amici curiae DISTRIBUTED. |
| | Sep 24 2001 | Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argumentDISTRIBUTED. |
| | Oct 1 2001 | Motion of Legal Ethicists, et al. for leave to file a brief as amici curiae GRANTED. |
| | Oct 1 2001 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| | Nov 5 2001 | ARGUED. |

(2)

No. 00-9285

IN THE
**SUPREME COURT OF THE UNITED STATES**

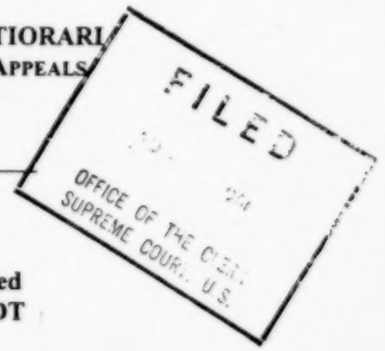
OCTOBER TERM, 2000

WALTER MICKENS, JR.,
*Petitioner,*

v.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**




**CAPITAL CASE**

**Imminent Execution Scheduled**
**April 17, 2001 at 9:00 p.m. EDT**

**Robert E. Lee**
**Mark E. Olive**
**VIRGINIA CAPITAL REPRESENTATION**
**RESOURCE CENTER**
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***Counsel of Record***

48 pp

**Capital Case**

**QUESTIONS PRESENTED**

A Fourth Circuit panel set aside petitioner's murder conviction and death sentence on Sixth Amendment grounds because the state judge who appointed petitioner's defense lawyer failed to inquire into the lawyer's manifest potential conflict of interest – later shown to have amounted to an actual conflict – resulting from his representation of the murder victim on delinquency charges at the very time of the murder. On rehearing *en banc*, a 7-to-3 majority held that such a conflict does not violate the Sixth Amendment.

1. Did the *en banc* Fourth Circuit err in holding – in conceded disagreement with the Second Circuit and at odds with the interpretation of *Wood v. Georgia*, 450 U.S. 261 (1981), by the Eighth Circuit and a number of state high courts – that "even if the trial court failed to inquire into a potential conflict [of interest] about which it reasonably should have known" (2001 WL 133196 at * 5), ***both*** an "actual conflict" ***and*** an "adverse effect" must be shown in order to establish a Sixth Amendment violation?

2. Did the *en banc* Fourth Circuit err in construing the explicit dispositional language of *Wood* – which ordered Sixth Amendment relief to be granted on a finding "that an actual conflict of interest existed" (450 U.S. at 273) when a trial judge had failed to inquire into a manifest potential conflict – as "no more than shorthand for an explicit two-part test" requiring a showing of "adverse effect" ***in addition to*** an actual conflict of interest (2001 WL 133196 at * 10)?

3. Did the *en banc* court err in holding that the "appropriate standard" for "adverse effect" requires not only a showing of (a) a plausible line of defense that conflicted counsel might have pursued and did not, and (b) the feasibility of such an alternative strategy on the facts known to conflicted counsel, ***but also*** (c) "that counsel's failure to pursue that strategy . . . was linked to the actual conflict" (2001 WL 133196 at * 11)?

4. Did the *en banc* court further err in endorsing a notion of this "link" that (a) essentially requires a showing of unreasonable judgments by counsel which would amount to ineffective assistance even in the absence of a conflict of interest (thus confusing the rules of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and *Strickland v. Washington*, 466 U.S. 668 (1984)) and (b) sustains counsel's judgments on the basis of the record as it was made by the conflicted lawyer himself (thus disregarding the holding of *Holloway v. Arkansas*, 435 U.S. 475 (1978), that such a record is too fallible to rely on because "the evil . . . [of a conflict of interest] is in what the advocate finds himself compelled to *refrain* from doing," *id.* at 490)?

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IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 2000

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WALTER MICKENS, JR.,
*Petitioner,*

v.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON,
*Respondent.*

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Walter Mickens, Jr., who is scheduled to be executed by the State of Virginia on April 17, 2001 at 9:00 p.m., E.D.T., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming a district court's denial of relief on Mickens' petition for habeas corpus.

## OPINIONS BELOW

The opinion supporting the judgement presented for review is that of the Court of Appeals *en banc* reported as *Mickens v. Taylor*, 2001 WL 133196 (4th Cir. (Va.), February 16, 2001), which is reprinted in the accompanying Appendix ("App.") at 1-24. It supplanted a panel opinion granting petitioner relief, *Mickens v. Taylor*, 2000 WL

1292972 (4th Cir. (Va.), September 14, 2000), reprinted at App. 25-46. The opinion of the district court denying habeas relief is reported as *Mickens v. Greene*, 74 F. Supp.2d 586 (E.D. Va. 1999), and reprinted at App. 47-80. An opinion of the Virginia Supreme Court affirming petitioner's conviction and death sentence on direct review is reported as *Mickens v. Commonwealth*, 442 S.E.2d 678 (Va. 1994). This Court granted certiorari and remanded in an order reported as *Mickens v. Virginia*, 513 U.S. 922 (1994), and the Virginia Supreme Court then ordered a new sentencing hearing, *Mickens v. Commonwealth*, 457 S.E.2d 9 (Va. 1995), as required by *Simmons v. South Carolina*, 512 U.S. 154 (1994). Reimposition of the death sentence was affirmed in *Mickens v. Commonwealth*, 478 S.E.2d 302 (Va. 1996), *cert.* denied, 520 U.S. 1269 (1997). A decision of the Supreme Court of Virginia denying a petition for a writ of habeas corpus on December 15, 1997 is unreported. It is set out at App. 81.

## JURISDICTION

The Court of Appeals *en banc* issued its opinion on February 16, 2001 and denied Mickens' timely application for rehearing on March 13, 2001. Mickens invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States, which provide in relevant part:



> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST., amend. VI.
>
> "No State shall . . . deprive any person of life [or] liberty . . . without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

## STATEMENT OF THE CASE

Petitioner Walter Mickens, Jr. was convicted of the capital murder of Timothy Hall and sentenced to death by a jury in the Circuit Court of the City of Newport News, Virginia in 1993. On the evidence in the present record, the crime was a particularly ugly one. Seventeen-year-old Hall was found stabbed to death, his body bearing 143 "sharp force injuries" of which 25 were fatal. He was lying face down on a mattress beneath an abandoned construction building near the riverside. Under a sheet of plywood, his body was nude from waist to socks, the legs spread apart, with pubic hairs on the buttocks and some white liquid near the anus. (2001 WL 133196 at *1.)

It appeared at trial that five days later, police officers responding to the report of an unrelated assault upon a juvenile arrested Mickens in a parking area beside the construction building. Mickens was questioned about Hall's murder and revealed knowledge that Hall had been killed with a knife. Served with a warrant for the murder and forcible sodomy of Hall, he admitted guilt to the officer who handed him the warrant and later to a cellmate. (2001 WL 133196 at *2.) The Commonwealth presented evidence of these admissions, evidence that after Hall's death, Mickens sold a pair of tennis shoes that Hall was wearing at the time of his death, and evidence that the pubic

hairs found on Hall's buttocks and sperm found on the mattress under Hall's body were consistent with samples taken from Mickens. (2001 WL 133196 at *2 - *3.)

Despite this evidence identifying Mickens as Hall's killer, Mickens took the stand at trial and denied any involvement in the killing. (74 F. Supp.2d at 607.) Mickens was represented at trial by two court-appointed lawyers, Bryan Saunders and Warren Keeling. Saunders was lead counsel (see 74 F. Supp.2d at 599) and assumed responsibility for about ninety per cent of the work. (2001 WL 133196 at *4.) The only evidence presented by defense counsel to support Mickens' denial of involvement was the testimony of his mother that he was home before dark every night during the period when the killing must have occurred (TT. 871 - 898); nothing was adduced to point to any alternative possible perpetrator. (*Id.*; see 74 F. Supp.2d at 610 - 611.) The jury disbelieved Mickens' denial, convicted him of capital murder in conjunction with attempted forcible sodomy, and sentenced him to death. (2001 WL 133196 at *3.) Scant mitigation evidence was presented at the jury sentencing hearing, none of it relating to the circumstances of the offense or to the victim. (Joint Appendix in the Court of Appeals for the Fourth Circuit, pp. 819 - 851.)

Mickens' initial death sentence was set aside after this Court granted *certiorari* and remanded his case to the Virginia Supreme Court[1] to reconsider his claim under

[1] *Mickens v. Virginia*, 513 U.S. 922 (1994) (per curiam), vacating and remanding the judgment entered upon the decision reported as *Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678 (1994).



*Simmons v. South Carolina*[2] that the sentencing jury should have been informed about his ineligibility for parole if sentenced to life imprisonment instead of death.[3] At a new sentencing hearing, Mickens was again represented by Saunders and Keeling (74 F. Supp.2d at 592), who again presented little evidence in mitigation (Joint Appendix in the Court of Appeals for the Fourth Circuit, pp. 1129 - 1142.). The jury made both the "vileness" and the "future dangerousness" findings that are predicates for a capital sentence under Virginia law[4] and fixed Mickens' punishment at death. (74 F. Supp.2d at 592.) The trial judge conducting the sentence review prescribed by Virginia law[5] received a post-sentence report including a long paragraph reciting statements by the mother of the seventeen-year-old murder victim that his death had "shattered her world" and that she would "'never be over the way my son was killed.'" (74 F. Supp.2d at 609.) He declined to set aside the jury's sentencing verdict and imposed a sentence of death. (74 F. Supp.2d at 592.) The Virginia Supreme Court affirmed Mickens' death sentence on appeal[6] and later summarily denied his petition for state postconviction relief.

New counsel were appointed to represent Mickens in federal habeas corpus pro-

[2] 512 U.S. 154 (1994).

[3] *Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9 (1995).

[4] See Va. Code Ann. §§ 19.2-264.2, 264.4(C) (Michie 1995).

[5] See Va. Code Ann. § 19.2-264.5 (Michie 1995).

[6] *Mickens v. Commonwealth*, 252 Va. 315, 478 S.E.2d 302 (1996), *cert.* denied, 520 U.S. 1269 (1997).

ceedings. (74 F. Supp.2d at 592.)[7] While investigating Mickens' background, federal habeas counsel went to the Newport News Juvenile and Domestic Relations Court ("JDRC") to review his file. Counsel asked the duty clerk for Hall's file as well, and the clerk produced it. This file revealed that at the moment of Hall's death, attorney Bryan Saunders – the same Bryan Saunders who later served as Mickens' court-appointed lead trial counsel – had been representing Hall on charges of assault and possession of a concealed weapon that were slated for trial the following week. (2001 WL 133196 at *3.)

Federal habeas counsel requested a copy of Hall's JDRC file. The clerk's supervisor refused, saying that counsel should never have been shown the file in the first place.[8] The supervisor took back the file and refused counsel further access to it. Counsel then obtained a subpoena for the file by reporting what it showed about Saunders' representation of Hall. (74 F. Supp.2d at 600, 602.)

Following additional investigation, counsel filed a federal habeas petition alleging, *inter alia*, that Saunders' representation of Mickens was tainted by a conflict of interest and violated Mickens' Sixth Amendment rights. The district court held a hearing on the claim, at which these facts appeared without dispute (74 F. Supp.2d at 599 & n.8):

On February 21, 1992, Timothy Hall's mother swore out a warrant for Hall's

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[7] Other counsel – neither Saunders and Keeling nor subsequent federal counsel – had represented Mickens in state postconviction proceedings. (2001 WL 133196 at *4.)

[8] Under Va. Code Ann. § 16.1-305 (Michie 1996), JDRC files are confidential and cannot be disclosed without a court order.



arrest, charging him with assault and battery on her. On March 13, 1992, Newport News police charged Hall with an additional offense: possession of a concealed weapon – a serrated bread knife wrapped in paper. On March 20, 1992, Hall appeared before the JDRC, which appointed Bryan Saunders to represent him on both charges and continued the case until April 3. (2001 WL 133196 at *3; 74 F. Supp.2d at 599.)

Sometime between March 20 and March 28, Hall came to Saunders' office. Hall and Saunders conferred for fifteen to thirty minutes. (2001 WL 133196 at *3; 74 F. Supp.2d at 599.) The district court found that this attorney-client interview "was confined to the circumstances surrounding each of the charged crimes" (74 F. Supp.2d at 599) but it also found that:

> "Through his representation of Hall, Saunders learned that: (a) Hall had been charged with carrying a concealed weapon at the intersection of 27th Street and Marshall in Newport News; (b) Hall's mother had pressed charges against him for assault, but she was not interested in prosecuting the case . . . ; and (c) Hall was not living with his mother at the time of his death." (74 F. Supp.2d at 606.)

March 28 was the last date on which Hall was seen alive. He was found dead on March 30. (74 F. Supp.2d at 599.) On April 3, Judge Foster of the JDRC dismissed the charges against Hall, noting by hand on Hall's record sheet (which showed that Saunders was Hall's appointed counsel at the time) that defendant Hall was deceased. (74 F. Supp.2d at 599, 613 - 614.) That same day, Saunders appeared at the JDRC for a hearing on the charges against Hall and was informed that Hall was dead and the charges dismissed. (74 F. Supp.2d at 599 - 606) On April 4, Mickens was arrested; on April 6,

Judge Foster appointed Saunders to represent Mickens in the killing of Hall. (74 F. Supp.2d at 606.) "Judge Foster did not inquire into whether Saunders would have a conflict in representing Mickens" (2001 WL 133196 at *4; see 74 F. Supp.2d at 613 - 614), and Saunders accepted the appointment without ever disclosing to anyone else – to Mickens, the criminal trial judge, or Saunders' court-appointed assistant counsel – that Saunders was representing Hall on criminal delinquency charges at the time of Hall's death (74 F. Supp.2d at 600, 606, 612 & n.20).

In the light of these undisputed facts, federal habeas counsel argued to the district court that Judge Foster had appointed Saunders to defend Mickens without inquiry into a potential conflict of interest that was known or should have been known to Judge Foster; that Saunders was afflicted with an actual conflict of interest throughout his representation of Mickens; and that this conflict of interest adversely affected Saunders' performance. Counsel pointed to Saunders' consistent disregard – both before and at Mickens' guilt-phase trial and two sentencing trials – of information and defensive or mitigating strategies that would have cast Saunders' former client, Hall, in a negative light. Though Hall was killed in a waterside location commonly used for homosexual trysts (see Joint Appendix in the Court of Appeals for the Fourth Circuit, pp. 1325 - 1326, 1081-2082) and located at the base of a precipitous embankment which would have made it unlikely that Hall could be brought there involuntarily,[9] and although a consent defense to the

[9] See Trial Exhibits 1-A to 1-D and the Joint Appendix in the Court of Appeals



charge of attempted forcible sodomy could have reduced the only capital murder charge against Mickens to non-capital murder (whether or not a self-defense claim was also raised to the murder charge itself, see 74 F. Supp.2d at 606 - 607), no evidence was presented on Mickens' behalf suggesting Hall's acquiescence in consensual sex with his killer. (See 74 F. Supp.2d at 607.) No investigation was undertaken of leads available to the defense that suggested Hall's involvement with other persons who might have had a motive to kill him, including a trio of creditors Hall had stiffed and a prostitute (who might have been male or female, according to different leads). (See 74 F. Supp.2d at 610 - 611.) The facts that 17-year-old Hall was not living at home and had assaulted his mother in a manner leading her to file charges against him (although she may have decided later for some reason not to press them) were not used in Mickens' defense in any way, even after the trial judge who was reviewing the jury's death verdict received a post-verdict report containing the most affecting statements (*e.g.*, """all I lived for was that boy,""" (74 F. Supp.2d at 609)) on the mother's part.

Saunders was called as a witness at the district court hearing and testified that he

for the Fourth Circuit, pp. 618 - 619 (guilt-phase testimony of Officer David Seals: *e.g.*, "It's a steep incline I went down--there's a drainpipe that runs down one side of the concrete embankment, and I used the drainpipe about halfway down and then you kind of have to walk on the incline, hold onto whatever you can. . . . There's no steps to get down to that location."). Mickens had originally been charged with the murder of Hall in connection with the crime of abduction as well as attempted forcible sodomy. At the preliminary hearing, the examining judge declined to find sufficient evidence of abduction and the prosecution did not thereafter pursue an abduction theory (see 2001 WL 133196 at *4 n.3).

never perceived any potential conflict of interest between his roles as counsel for Mickens and as counsel for Hall. (74 F. Supp.2d at 605 - 606.) The district court credited this testimony (see, *e.g.*, 74 F. Supp.2d at 605 - 606, 612 - 613) saying that "the evidence shows that, regrettably, Saunders never struggled with the ethical issues" involved (74 F. Supp.2d at 605) in representing a capital murder defendant after having represented the murder victim at the time of death, in connection with the victim's alleged recent criminal delinquencies.[10] This "utter insensitivity to the ethical issues raised by the facts" (74 F. Supp.2d at 612) was attributed by the district court twice to Saunders' belief that "his allegiance to Hall '[e]nded when I walked in the courtroom and they told me he was dead and the case was gone'" (74 F. Supp.2d at 605)[11] and once to "Saunders'

[10] The district court acknowledged that "Hall's criminal history might have had some relevance to Mickens' case if Mickens' testimony had not foreclosed any theory of self-defense." (74 F. Supp.2d at 606 n.15. ) But it believed that, because Mickens testified at trial that he did not kill Hall, "any confidential information [Saunders may have obtained] from Hall . . . was [not] relevant to Mickens' defense either on the merits or at sentencing." (74 F. Supp.2d at 606.) Of course, at the time Saunders accepted an appointment to represent Mickens, Saunders had no idea what Mickens' "testimony" might be. And even in retrospect, the "testimony" to which the district court refers as making Hall's history irrelevant *was presented at a trial at which Mickens was counseled and represented by an attorney afflicted with a conflict of interest* that foreclosed the use of information unfavorable to Hall and might therefore have led Saunders to permit – or even encourage – Mickens to take the stand and deny guilt without adequate consultation about whether Mickens would be better advised to forgo testifying and develop theories of defense or mitigation involving consensual sodomy, assaultive behavior, sexual mockery, or other forms of discreditable activity by Hall contributing to his death.

[11] See also 74 F. Supp.2d at 606: "Without condoning the inexcusable failure to disclose the previous representation of Hall, the Court finds that, as a factual matter, Saunders *did not believe* that any 'continuing duties to [a] former client[ ] [might] interfere with his consideration of all facts and options for his current client' (emphasis



conclusion that he did not obtain any confidential information from Hall . . . and that '[n]othing I knew or did or had anything to do with Mr. Hall had anything to do with [Mickens'] case'" (74 F. Supp.2d at 606) . The district court characterized the first of these beliefs as "remarkably wrong" (74 F. Supp.2d at 605) and also found it "inconceivable that Saunders obtained no confidential information from Hall" (74 F. Supp.2d at 606) but ended by concluding that whatever confidential information Saunders may have learned from Hall was not "relevant to Mickens' defense either on the merits or at sentencing" (74 F. Supp.2d at 605).[12] The district court conceded that "[w]hen Saunders was appointed to represent Mickens in the capital murder of Hall, Saunders was obligated to consider the ethical problems posed by the appointment because Saunders' duty to zealously represent Mickens might be compromised by his loyalty to Hall, including his obligation to preserve Hall's secrets and confidences" (74 F. Supp.2d at 605); the district court found as a fact that Saunders had never considered these ethical problems (74 F. Supp.2d at 605) or disclosed the fact of his prior representation of Hall to Mickens or the trial court or even Saunders' co-counsel so that *they* could consider the problems (74 F. Supp.2d at 600, 606, 612 & n.20); but the district court nevertheless concluded that Saunders' dual role in relation to Hall and Mickens neither constituted an "actual conflict of interest" (74 F. Supp.2d at 604 - 606)

added).

[12] See note 10 *supra*.

nor had an "adverse effect" on his representation of Mickens (74 F. Supp.2d at 606 - 613). These conclusions were based upon an analysis that accepted as *given* the record made by Saunders at Mickens' trial, including Mickens' testimonial disavowal of any connection with Hall's death. Such a disavowal, the district judge believed, made irrelevant the ethical constraints that restricted Saunders' ability to develop and present evidence disparaging to Hall.[13] Mickens' federal habeas petition was accordingly denied.

A divided three-judge panel of the Fourth Circuit reversed this decision on the grounds that Mickens

> "has shown that (1) the state judge failed to inquire into an apparent conflict that she knew or reasonably should have known existed, (2) he did not waive any conflict, and (3) his lawyer, Saunders, had an actual conflict of interest. This is sufficient under Wood v. Georgia [450 U.S. 261 (1981)] to establish the merits of his claim that he was deprived of his Sixth Amendment right to representation that is free of conflicts of interest."

(2000 WL 1292972 at *13.) A dissenting opinion argued that, while "the decision in Wood . . . has not turned out to be a model of clarity," *Wood* is best read as requiring a showing of *both* an actual conflict of interest *and* a resulting adverse effect on counsel's performance; and that Mickens had not shown the requisite adverse effect. (2000 WL 1292972 at *14 - 21.)

The Commonwealth's petition for rehearing *en banc* was granted and the Fourth Circuit essentially adopted the position of the panel dissent in rejecting Mickens' Sixth

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[13] See note 10 *supra*.



Amendment claim by a vote of seven to three. After acknowledging that the claim was properly before the *en banc* court on the merits,[14] the majority made two assumptions which framed its analysis of the Sixth Amendment issues presented. It "accept[ed] for purposes of discussion, without deciding the issue, that Judge Foster, who appointed Saunders to represent Mickens, reasonably should have known that Saunders labored under a potential conflict of interest arising from his previous representation of Hall." (2001 WL 133196 at *7.) And it assumed *arguendo*, again without need to "reach Mickens'] . . . argument [on the point decided in his favor by the panel][15] that he has established an actual conflict of interest." (2001 WL 133196 at *10.)[16]

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[14] The *en banc* court agreed with the panel majority and with the district court that Mickens' failure to raise the claim in state court did not bar federal habeas adjudication on the merits under the doctrines of exhaustion or procedural default because the basis for the claim was first discovered by Mickens' federal habeas counsel and could not have been discovered earlier by lawyers for Mickens other than Saunders himself. (2001 WL 133196 at *6.) This circumstance constituted "cause" (*id.*); and "[o]ur inquiry as to prejudice for purposes of excusing Mickens' [procedural] default . . . incorporates the test for evaluating his underlying conflict of interest claim" (*id.*). Since the conflict claim was not "adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d), the Sixth Amendment issues are not subject to the standards of review prescribed by AEDPA's subsections 2254(d)(1) and (2). Thus, the *en banc* court addressed and squarely resolved "the merits of Mickens' conflict of interest claim." (2001 WL 133196 at *6.)

[15] The panel majority's discussion of the issue of actual conflict is found in 2000 WL 1292972 at *7 - *13. The panel dissenter also "accept[ed], for the purposes of argument, the [panel] majority's conclusion that Mickens' attorney labored under an actual conflict of interest." (2000 WL 1292972 at *15.)

[16] See also 2001 WL 133196 at *5: "Because we find that Mickens has failed to show an adverse effect, we . . . deny Mickens' petition without deciding whether Mickens has demonstrated that his attorney labored under an actual conflict of interest."

In this state of the case, the *en banc* majority saw the large doctrinal issue presented as involving the appropriate interpretation of *Wood v. Georgia* – the mainstay of the panel's decision granting Mickens relief – in the light of the earlier opinion in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), which was quoted and paraphrased three years after *Wood* in *Strickland v. Washington*, 466 U.S. 668 (1984):

> "Mickens notes that the Wood Court remanded to the trial court [which had failed to conduct any inquiry into a potential conflict of interest of counsel apparent on the face of the record] 'to determine whether the conflict of interest that this record strongly suggests actually existed' with an instruction to award a new hearing if 'an actual conflict existed . . . ' but did not expressly require the trial court to identify an adverse effect. . . . Mickens concludes from this remand instruction that the Wood court eliminated the adverse effect requirement [laid down by *Cuyler* – a case in which counsel's potential conflict of interest was *not* apparent on the record – ] in cases where the trial court failed to inquire into a conflict of interest about which it reasonably should have known."

(2001 WL 133196 at *9.) The *en banc* court rejected this conclusion; it declared – with three judges dissenting on the point – that "the Wood Court's terse instruction to the trial court on remand cannot bear the constitutional weight Mickens ascribes to it" (2001 WL 133196 at *10); and it held categorically that "[t]he Supreme Court's decision in Wood does not relieve a petitioner [who is "challenging his conviction on conflict of interest grounds"] of [the] . . . burden [imposed by *Cuyler* to "establish that his attorney's conflict of interest adversely affected his performance"], even when the trial court has failed to inquire into a potential conflict about which it reasonably should have been



aware." (2001 WL 133196 at *14.)[17]

Elaborating the adverse-effect requirement, the *en banc* majority "agree[d] with the district court's articulation of a three-part standard for showing an adverse effect." (2001 WL 133196 at *11.) In addition to "identify[ing] a plausible alternative defense strategy that his [conflict-ridden] . . . counsel might have pursued" and showing that "the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time," a Sixth Amendment claimant must also show that "defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict" (*id.*). The requisite "link" was held missing whenever the district court found as a matter of subjective fact that Saunders' reasons for various failures were "unrelated" to Saunders' conflict of interest[18] or where Saunders' course of action was one that a competent, unconflicted lawyer might have chosen.[19] [20] "Because . . . [it] agree[d] with the district

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[17] See also the majority's statement of its broad holding in 2001 WL 133196 at *5.

[18] See, *e.g.*, 2001 WL 133196 at *13: "The district court . . . concluded that Saunders' failure to investigate into matters identified by Mickens was either harmless or unrelated to Saunders' conflict of interest. . . . In particular, the district court attributed Saunders' failure to inquire into leads as to possible alternative perpetrators of the murder to the weak nature of the leads, rather than to Saunders' conflict of interest. . . ."

[19] See, *e.g.*, 2001 WL 133196 at *12: "Because Saunders was entitled to rely on the information provided by his client, consensual sodomy was not a viable defense strategy at the time Saunders made his decision not to pursue it. See Royal v. Taylor, 188 F.3d 239, 248-49 (4th Cir. 1999) [a case *not* involving any conflict of interest but dealing with what counsel is "entitled to" do in the context of a claim that *un*conflicted counsel was ineffective]; Roach v. Martin, 757 F.2d 1463, 1476-80 (4th Cir. 1985) [a case involving wholly independent claims of conflict of interest and ineffective

court that many of Mickens' assertions of adverse effect were not viable defense strategies[21] and that any viable defense strategies were not linked to his attorney's

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assistance under *Strickland* in which the passages about counsel's being entitled to rely on a client's statements are found solely in the portion of the opinion discussing the *Strickland* claim]." See also *id.*: "Choosing not to vilify the mother of the victim cannot be *the mark of incompetent counsel* by any measure" (emphasis added).

[20] We use the disjunctive "or" because it is plain that the *en banc* majority held the requisite "link" unestablished even when Saunders' failings were below the standard of professionally competent behavior, so long as they were not subjectively motivated by his perception of conflicting obligations to Mickens and Hall. For example, as quoted in note 18 *supra*, the *en banc* majority approved the district court's conclusions "that Saunders' failure to investigate into [various] matters identified by Mickens was either harmless or unrelated to Saunders' conflict of interest." In connection with one of those investigative failures, the district court wrote: "The lead should have been pursued because . . . [it] suggested that there might have been evidence of an alternative perpetrator. The record discloses no reason for the failure to follow that lead *other than Saunders' lack of perspicacity or perhaps indolence*. Neither of these reasons bespeaks that he failed to act because of his previous representation of Hall." (74 F. Supp.2d at 610.)

[21] Like the district court (see note 10 *supra*), the *en banc* Court of Appeals majority evaluated the "viability" of alternative strategies against the record *as it was made by conflicted counsel himself* and without regard to what sort of record might have been made by conflict-free counsel for Mickens. See, *e.g.*, 2001 WL 133196 at *12: "[P]resentation of . . . evidence [obtained by following up rumors that Hall was a male prostitute] would have been counter-productive and would have been inconsistent with Mickens' assertions of sympathy for the victim and his family. Mickens v. Greene, 74 F.Supp.2d at 608." The cited passage from the district court opinion (at 608) reads: "Of course, adoption of that alternative strategy [of investigating negative information about Hall] would have been inconsistent with Mickens' profession of innocence and his purported regret at Hall's passing. 'I'll pray each and every day that [Hall] may rest in peace.' (6/4/93 Hr. T. at 1090 (sentencing hearing)). Saunders carried that standard during his closing argument, emphasizing the sanctity of human life and expressing regret for Hall's death. (2/7/96 Hr. T. at 479-80; 1/13/99 Hr. T. at 157.) Saunders eschewed an attack on Hall, the young victim of a horrible crime, because it would have appeared disingenuous and would have diminished the value of Mickens' life in the eyes of the jury. (1/13/ Hr. T. at 112, 156-58; 12/23/98 Dep. At 76, 77)."



conflict of interest, . . . [the *en banc* majority] reject[ed] Mickens' Sixth Amendment challenge to his conviction based on the theory that the claimed conflict had an adverse effect on the representation of his attorney" (2001 WL 133196 at *13) and denied habeas corpus relief.

The Fourth Circuit's *en banc* decision was handed down on February 16, 2001. On February 20, the Commonwealth asked the trial court to set an execution date for Mickens, and on March 2 that court set the date for April 17 at the Commonwealth's request despite Mickens' representation that he wanted and intended to seek this Court's review of the divided Fourth Circuit decision by *certiorari*. On March 13, the Fourth Circuit denied rehearing and on March 28 it denied a stay of mandate and a stay of execution to permit this Court to consider a petition for *certiorari* without the pressure of an April 17 deadline. The *en banc* vote on the stay applications was again 7 to 3, and the dissenting judges filed an opinion observing that "in at least one other circuit Mickens would be granted habeas relief" and "he should not be put to death before he has a fair opportunity to seek Supreme Court review."[22]

## REASONS FOR GRANTING THE WRIT

This case involves a set of closely connected issues concerning the appropriate

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[22] Opinion of Judge Michael, joined by Judges Motz and King, dissenting from the order of the *en banc* court denying stays in *Mickens v. Taylor*, 2001 WL 300140(4th Cir. (Va.), March 26, 2001 [*en banc*]).

Sixth Amendment analysis when a judge appointing counsel for a criminal defendant chooses a lawyer having an apparent conflict of interest and fails to inquire into the potential conflict. At least two of the issues are the subject of strong disagreement among the federal circuit courts of appeals and state courts of last resort concerning the rules to be derived from the interplay of *Holloway v. Arkansas*, 435 U.S. 475 (1978), *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and *Wood v. Georgia*, 450 U.S. 261 (1981), in light of the description of their teachings in *Strickland v. Washington*, 466 U.S. 668 (1984).

The approach taken to these issues by a 7-to-3 majority of the Fourth Circuit sitting *en banc* below begins by aligning the Fourth and Tenth Circuits against the Second and Eighth Circuits and against several state Supreme Courts. As the Fourth Circuit majority's analysis proceeds further, it departs from the rules adopted by several other circuits to implement the teachings of *Cuyler* and *Wood*, and it ends by making a hash of this Court's precedents: reading the *Wood* opinion in admitted derogation of its explicit language; ignoring the first principles of *Holloway*; and conflating the doctrines that govern Sixth Amendment adjudication in conflict-of-interest cases on the one hand and in non-conflict, ineffective-assistance-of-counsel cases on the other – two discrete bodies of rules that this Court expressly distinguished in both *Cuyler* and *Strickland*.

The opinions below and the way this record squarely poses the issues for resolution make Mickens' case an ideal vehicle for the Court's use in clarifying a vexed area



of Sixth Amendment law while rectifying a grave Sixth Amendment violation.

**ISSUE 1:**

**The Fourth Circuit's Demand that Both an Actual Conflict of Interest and an Adverse Effect Be Shown to Establish a Sixth Amendment Violation When a Court Appointing Criminal Defense Counsel Ignores a Patent Potential Conflict**

The first issue, which divided the *en banc* court below, is what a Sixth Amendment claimant needs to show in order to obtain a new trial if and after s/he has once established, within *Wood v. Georgia*, that "the trial court . . . failed to inquire into a potential conflict [of interest] about which it reasonably should have been aware" (2001 WL 133196 at *14). The Fourth Circuit majority assumes that Mickens has shown not only a violation of *Wood*'s requirement of inquiry "into a potential conflict about which [the judge appointing counsel] . . . reasonably should have known" (2001 WL 133196 at * 5) but also that Mickens' attorney "labored under an actual conflict of interest" (*id.*) It nevertheless holds that he is not entitled to a new trial unless he *further* "establish[es] an adverse effect arising from his attorney's conflict of interest." (2001 WL 133196 at *14; see also *id.* at *5, * - *10.)

This holding sets the Fourth Circuit flatly at odds with the Second Circuit,[23]

[23] See, *e.g.*, *Ciak v. United States*, 59 F.3d 296 (2d Cir. 1995); *United States v. Malpiedi*, 62 F.3d 465 (2d Cir.1995); *United States v. Rogers*, 209 F.3d 139 (2d Cir. 2000). The Second Circuit rule is described as follows in *United States v. Stantini*, 85 F.3d 9, 13 (2d Cir. 1996) (dictum):

> "The trial court has an obligation to inquire into the facts and circumstances of an attorney's interests either in response to a timely conflict of interest objection, Holloway v. Arkansas, 435 U.S. 475, 488 . . . (1978), or 'when it knows or reasonably should know of the possibility of a conflict of interest.' Strouse v. Leonardo, 928 F.2d 548, 555 (2d Cir.1991); see also Levy [United States v. Levy, 25 F.3d 146 (2d Cir.1994)], . . . at 153. Failure to engage in such an inquiry, when it is required, results in an automatic reversal. Wood v. Georgia, 450 U.S. 261, 272 n. 18 . . . (1981); Levy, 25 F.3d at 153-54."

Accord: *Sutton v. Strack*, 2001 WL 114316 (S.D.N.Y. 2001) at *1 - *2 and cases cited. In *Ciak*, which is the leading Second Circuit case applying this rule to order a new trial, the Court of Appeals held that no showing of adverse effect was necessary where the trial judge had "neglected to conduct an inquiry when . . . 'sufficiently apprised of . . . the possibility of a conflict of interest,'" (59 F.3d at 304) and the trial record itself established both "actual and potential conflicts of interest" (59 F.3d at 307). In *Malpiedi*, the conflict issue was brought to the court's attention but not adequately resolved at trial; it was raised on a motion for new trial and aired in an evidentiary hearing on the motion; the district court denied a new trial, finding that while there may have been a conflict of interest, the defendant's representation was "not adversely affected by the conflict" because counsel's performance was effective and was motivated solely by appropriate strategic considerations (62 F.3d at 469); the Court of Appeals reversed and ordered a new trial on the ground that the trial record and post-trial hearing evidence disclosed "an actual conflict of interest" (62 F.3d at 469) and, under those circumstances, no showing of adverse effect was required. In *Rogers*, the trial court failed to make appropriate inquiry despite "awareness of a possible conflict" (209 F.3d at 144) and the Court of Appeals reversed for a new trial, rejecting the Government's argument that this result was not required because "the district court did in fact evaluate the conflict – in response to one of Rogers's post-trial *pro se* motions – and found that Rogers suffered no adverse effect" (209 F.3d at 146):

> "If the district court had fulfilled its initial obligation, yet made an inadequate inquiry or obtained a defective waiver, reversal would be appropriate only upon a showing of prejudice or adverse effect. *See* United States v. Lussier, 71 F.3d 456, 463 (2d Cir.1995) (citing [United States v.] Levy, 25 F.3d [146,] . . . 152 (1994)). Absent the required initial inquiry, however, we have no occasion to consider whether there was an adverse effect; indeed, once it is established that a conflict was seen to be possible



the Eighth Circuit,[24] the Supreme Court of Iowa,[25] the Supreme Court of Kansas,[26] the

> and was ignored, we have no occasion to consider whether there was a conflict in fact." (*Id.*)

[24] See *Atley v. Ault*, 191 F.3d 865, 870 (8th Cir. 1999):

> "[T]he Holloway Court held that when a trial court fails to discharge its constitutional duty to determine whether the defendant is receiving assistance of counsel unburdened by a conflict of interest, prejudice is presumed and reversal of the conviction is automatic. *See* id. at 489, 98 S.Ct. at 1181; *see also* Wood, 450 U.S. at 272 n. 18, 101 S.Ct. at 1104 n. 18 (noting that Cuyler 'mandates a reversal when the trial court has failed to make an inquiry even though it "knows or reasonably should know that a particular conflict exists"') (quoting Cuyler, 446 U.S. at 347 . . .)."

In *Atley*, defense counsel and the defendant both requested that counsel be discharged because of a conflict of interest, and the prosecution supported their requests. The Eighth Circuit might have treated these circumstances as bringing *Holloway* into play without regard to *Wood* but it did not. Instead of viewing the requests as objections under *Holloway*, it viewed them as communicating to the trial judge information that alerted him to the existence of a potential conflict, thus bringing *Holloway* into play through the mediation of *Wood*. See. *e.g.*, 191 F.3d at 871 ("As the Iowa Supreme Court recognized, the representations of Weinberg and the prosecutor alerted the trial judge to the 'actual or serious potential for conflict that might occur during the trial' and 'necessitated an inquiry by the court to assess its gravity.' Atley, 564 N.W.2d at 829; *see also* id. at 828 (noting that it was applying Supreme Court authorities that require an inquiry because the trial court was fully advised of the existence of a potential conflict of interest). Under Holloway, the trial court was then constitutionally obligated to either substitute new counsel or take adequate steps to ascertain the seriousness of the risk presented by the conflict."); 191 F.3d at 874 ("As stated above, Holloway requires reversal where the trial court failed to discharge its duty to inquire into a known potential conflict because prejudice to the accused is presumed. Holloway, 435 U.S. at 487-89 . . . .").

[25] *State v. Watson*, 620 N.W.2d 233, 237 - 238 (Iowa 2000):

> "Our review of the cases leads us to agree with those courts holding that

Supreme Court of Ohio,[27] and the Supreme Court of Washington,[28] regarding the

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where the trial court knew or should have known of a particular conflict, reversal is required without a showing that the conflict adversely affected counsel's performance, even though no objection was made at trial. This conclusion is consistent with the Supreme Court's interpretation of Cuyler in Wood, where it said that Cuyler "mandates a *reversal* when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" Wood, 450 U.S. at 273 n. 18 . . . (emphasis added). Logic also supports this result. If the trial court knows that a particular conflict exists and fails to conduct an inquiry, it should not matter what the source of the court's knowledge is. Regardless of how the trial court becomes aware of the conflict, the defendant has been denied his right to independent counsel. It is only in cases of uncertainty, where the record shows the mere *possibility* of a conflict, that the additional requirement of an adverse effect on counsel's performance is required to establish an *actual* conflict."

[26] *State v. Jenkins*, 257 Kan. 1074, 1083-1084, 898 P.2d 1121, 1129 (1995) (alternative ground):

"[W]hen a possible conflict exists, but the trial court is not advised of the possibility, the limited presumption set forth in Cuyler applies, and the defendant, in order to establish a violation of his Sixth Amendment right to the effective assistance of counsel, must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. See Cuyler, 446 U.S. at 348 . . . . On the other hand, we hold that where the trial court is advised of the possibility of a conflict by either the defendant or the State, the court is required to initiate an inquiry to insure that the defendant's Sixth Amendment right to counsel is not violated. In this instance, a showing that there is an actual conflict of interest will result in automatic reversal. See Holloway, 435 U.S. at 489 . . . . Prejudice to the defendant is presumed, and reversal of the defendant's conviction is automatic."

[27] *State v. Gillard*, 64 Ohio St.3d 304, 311-312, 595 N.E.2d 878, 883 (1992):

"A review of Holloway, Sullivan and Wood, supra, clearly demonstrates that where a trial court knows or reasonably should know of an attorney's possible conflict of interest in the representation of a person charged with a crime, the trial court has an affirmative duty to inquire whether a conflict of interest actually exists. The duty to inquire arises not



consequences of a *Wood* violation. These courts hold that:

"If an actual conflict existed and the trial court knew or should have known of the conflict, yet failed to make inquiry, reversal is required. *See* Wood, 450 U.S. at 273 n. 18 . . . . If the record on appeal shows only the possibility of a conflict, then the case must be remanded for a determination as to whether an actual conflict existed and/or whether the defendant made a valid waiver of his right to independent counsel. [footnote omitted] *See* id. at 273-74 . . . . If, on remand, an actual conflict is found, prejudice is presumed and reversal is mandated. *See id.*; Holloway, 435 U.S. at 488 . . . . If there is no indication that the trial court knew or should have known of an actual conflict, and defendant made no objection to his representation, then the defendant, in order to obtain a reversal on appeal, must prove that his counsel rendered ineffective assistance by proving that an actual conflict adversely affected counsel's performance. *See* Cuyler, 446 U.S. at 348."[29]

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only from the general principles of fundamental fairness, but from the principle that where there is a right to counsel, there is a correlative right to representation free from conflicts of interest. See, generally, Wood, supra. Where a trial court breaches its affirmative duty to inquire, a criminal defendant's rights to counsel and to a fair trial are impermissibly imperiled and prejudice or 'adverse effect' will be presumed. See, *e.g., Holloway,* Sullivan and Wood, supra."

[28] *In the Matter of the Personal Restraint of Richardson*, 100 Wash.2d 669, 677, 675 P.2d 209, 214 (1983): "Taken together, *Holloway, Sullivan,* and *Wood* create two rules. First, a trial court commits reversible error if it knows or reasonably should know of a particular conflict into which it fails to inquire. Second, reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting his lawyer's performance."

[29] *Watson*, 620 N.W.2d at 238. The Nebraska Supreme Court and the Court of Appeal of California, Fifth District, have applied the same rule, both seeming to derive it from *Cuyler* and *Wood*. See *State v. Hudson*, 208 Neb. 649, 656 - 657, 305 N.W.2d 359, 363 (1981); *People v. Elston*, 130 Cal. App.3d 721, 729 - 730, 734, 182 Cal. Rptr. 30, 35, 37 - 38 (1982).

This is probably also the rule of the Seventh Circuit,[30] and it has been described as a prevalent Sixth Amendment doctrine by other federal and state courts which reviewed the authorities but found no need to take a definitive position on the issue.[31]

On the other hand, the *en banc* Fourth Circuit's reading of *Wood* is in accord with the Tenth Circuit's,[32] possibly with the Eleventh Circuit's,[33] and partly (but only partly)

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[30] The Seventh Circuit cases use two different formulations in stating what needs to be shown to obtain a new trial on conflict-of-interest grounds. Under one formulation, "if the defendant or her attorney alerted the trial judge to a possible conflict of interest or the judge otherwise knew or reasonably should have known that such a possibility existed, we will presume that the defendant was prejudiced if the judge failed to conduct an inquiry into the matter. . . . However, if the trial judge was not put on notice of a potential conflict, we will find prejudice only if the defendant demonstrates that her counsel actively represented conflicting interests and that the conflict adversely affected the counsel's performance." *Cabello v. United States*,188 F.3d 871, 875 (7th Cir. 1999). See also *Lipson v. United States*, 233 F.3d 942, 945 (7th Cir. 2000); *United States v. Pergler*, 233 F.3d 1005, 1010 (7th Cir. 2000); *Holleman v. Duckworth*, 155 F.3d 906, 911 (7th Cir. 1998). Under the other formulation, when a trial court has "failed to conduct a hearing and determine the impact of the conflict of interest . . . we will presume that the conflict prejudiced . . . [the defendant] if he has shown a possibility of prejudice." *United States v. Shorter*, 54 F.3d 1248, 1253 (7th Cir.1995). See also *United States v. Horton*, 845 F.2d 1414, 1418 (7th Cir. 1988); *United States v. Fish*, 34 F.3d 488, 492 (7th Cir. 1994). The application of the "possibility of prejudice" standard in *Shorter*, *Horton*, and *Fish* seems to demonstrate clearly that it is lower than the "adverse effect" standard used in *Cuyler* cases (where the trial judge was not on notice to inquire into a conflict), but because the opinions do not say so explicitly, we cannot be completely confident about the Seventh Circuit rule.

[31] See, *e.g.*, *Garcia v. Bunnell*, 33 F.3d 1193, 1198 - 1200 (9th Cir. 1994); *Lettley v. State*, 358 Md. 26, 38 - 39, 746 A.2d 392, 399 (2000); *State v. Crespo*, 246 Conn. 665, 686, 694, 695 n.27, 718 A.2d 925, 937, 941& n.27 (1998).

[32] See *United States v. Winkle*, 722 F.2d 605, 611 - 612 (10th Cir. 1983). The *Winkle* court's discussion of the issue is so terse that it is difficult to determine what argument it was rejecting when it wrote that "we cannot agree that reversal and a new trial are now mandated in the circumstances of this case" (722 F.2d at 611). But plainly



in accord with the First Circuit's.[34] Such a disarray among the courts of appeals, and

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the court rejected *some* argument against the disposition that it ended up by making of the appeal; and plainly that disposition called for a "hearing to determine whether the conflict of interests, which the record strongly suggests, actually existed and adversely affected defense counsel's performance at the time of trial" (722 F.2d at 611 - 612).

[33] See *Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999) (*en banc*). On the facts, it appears that the trial judge in *Freund* failed to make an adequate inquiry into defense counsels' potential conflicts of interest of which the judge was advised. And the Eleventh Circuit's ultimate disposition of Freund's conflict-of-interest claim is to reject it on the grounds that he has shown neither an actual conflict nor an adverse effect on counsels' performance – both showings being treated as required elements of a Sixth Amendment case for a new trial. However, the *Freund* opinion nowhere indicates that Freund made any argument that either of these two showings is *not* required in order to obtain a new trial in a case where the *Wood* duty to inquire into a manifest potential conflict of interest has been disregarded; and we have not found any Eleventh Circuit opinion addressing such an argument. (The one reference to *Wood* in *Freund* appears in the dissent, is indirect, and has to do with a completely unrelated subject. See 165 F.3d at 871 n.2.)

[34] The *en banc* opinion below cites *Brien v. United States*, 695 F.2d 10, 15 n.10 (1st Cir. 1982), as "read[ing] Wood as we do" 2001 WL 133196 at *9 n.6. This is only partly accurate. *Brien* certainly holds that a defendant is not entitled to a new trial by a showing, without more, that his or her trial judge failed to make the requisite *Wood* inquiry into a potential conflict of which the judge was apprised. But the *more* which *Brien* says must be shown to obtain a new trial is only that the defendant's counsel suffered from an "actual conflict of interest," and not that such a conflict had an adverse effect on his or her performance. See 695 F.2d at 15 n.10 ("*Wood* . . . did not require an automatic reversal of the conviction but merely remanded the case to enable the trial court to conduct the necessary inquiry, the implication being that the convictions would only be overturned if an actual conflict were found. Here the section 2255 hearing can serve the same function that the remand served in *Wood*, enabling our review to focus upon the question of whether there was an actual as opposed merely to a hypothetical and unreal conflict."). And in determining whether an actual conflict existed, *Brien* explicitly rejects the approach – which is at the core of the *en banc* Fourth Circuit decision in Mickens' case (see Issues 3 and 4 *infra*, dealing with the Fourth Circuit's "link" analysis) – of inquiring whether counsel's course of action at trial was *motivated* by the conflict of interest. 695 F.2d at 16 n.11 ("The district court found that [defense counsel] Cardinale's decision not to call [a witness,] Abrahams[,] could be supported by reasonable strategic

between some courts of appeals and state supreme courts, on a clear-cut Sixth Amendment issue of broad general applicability, strongly calls for this Court's exercise of its *certiorari* jurisdiction to resolve the imbroglio.

That is particularly true since enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132. Insofar as it amends 28 U.S.C. § 2254(d) to restrict federal habeas review of state-court rulings of federal constitutional law to the question whether a state court decision "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," AEDPA greatly reduces the capability of federal habeas proceedings to promote a uniform construction of the federal constitutional rules governing basic criminal-procedure issues in both state and federal courts.[35] This concomitantly increases the importance of *certiorari* review in cases where "a United States court of appeals has . . . decided an important federal question in a way that conflicts with a decision by a state court of last resort" (Supreme Court Rule 10(a)) dealing with a constitutional issue common to criminal proceedings in both sets of courts. Of course, the same deference

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reasons. We find that irrelevant. [Defendant] Brien does not have to show that the alternatives he suggests would have been used but for the conflict, he merely has to show that they were plausible options foreclosed because of Cardinale's competing interests.").

[35] After AEDPA, the state courts can no longer look to federal habeas decisions for guidance in interpreting the federal constitutional rules applicable to state criminal proceedings, because the task of the state courts in interpreting those rules (to get matters of federal constitutional law *right*) is significantly different than the task of the federal habeas courts (to say only whether state-court constitutional rulings, right or wrong, are objectively *unreasonable*, see *[Terry] Williams v. Taylor*, 529 U.S. 362 (2000)).



provision of AEDPA will ordinarily make federal habeas corpus cases inappropriate vehicles for this Court's important work of resolving state-court/federal-circuit disagreements about such issues. But Walter Mickens' federal habeas case is the exception to this ordinary rule: his Sixth Amendment conflict-of-interest claim is presented for decision – and was decided by the Court of Appeals below – squarely on the merits, with none of the fuzziness attendant to deferential review under AEDPA's § 2254(d), because in his case there was no prior state-court adjudication of the issue to defer *to*.[36]

**ISSUE 2:**

**The Fourth Circuit's Admitted Translation of the Explicit Dispositional Language of *Wood* into "Shorthand" that Means Something Different from its Plain Terms**

The *en banc* Fourth Circuit majority thought that Mickens' Sixth Amendment claim stirred a tension among this Court's three leading cases on conflict-of-interest: *Cuyler v. Sullivan*, *Wood v. Georgia*, and *Strickland v. Washington*. The majority purported to resolve that tension by holding that *Wood*, the case most closely on point, does not mean what it says explicitly. Finding that the trial judge in *Wood* – like the judge who appointed Bryan Saunders to represent Walter Mickens – had failed to inquire into a potential conflict of interest which the judge knew or should have known existed, the *Wood* opinion remanded the case with instructions that the trial court "should hold a hearing to determine whether the conflict of interest that this record strongly suggests

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[36] See note 14 *supra*.

actually existed . . . ." 450 U.S. at 273. Specifying both the issue to be heard and the consequences of its resolution, the *Wood* opinion went on to order: "If the court finds that an actual conflict existed . . . and that there was no valid waiver of the right to independent counsel, it must hold a new . . . [trial] that is untainted by a legal representative serving conflicting interests." 450 U.S. at 273 - 274.

The year before, in *Cuyler*, the Court had laid down a two-part inquiry to be undertaken in cases where a potential conflict of interest exists but the trial court neither knows nor has reason to know about it. 446 U.S. at 347. In such cases, a Sixth Amendment violation can be made out only by showing *both* an actual conflict of interest *and* an adverse effect . 446 U.S. at 348, 349 - 350. Describing the rule of *Cuyler* three years after *Wood* in *Strickland v. Washington*, the Court again explicitly articulated the same two-part inquiry, writing that a defendant must demonstrate "that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" 466 U.S. at 692, quoting *Cuyler*, 446 U.S. at 348. In between these two two-part formulations, the Court in *Wood* spoke ***only*** of a determination "that an actual conflict existed" (450 U.S. at 273) when delineating the precise findings that would call for a new trial in one of the "special circumstances" contemplated by *Cuyler* (446 U.S. at 346 - 347), namely, where "the trial court knows or should reasonably know that a particular conflict exists" but fails to inquire into it (446 U.S. at 347). Yet the *en banc* Fourth Circuit glossed *Wood*'s conspicuous one-issue instruction



to the trial court as "amount[ing] to no more than shorthand for an explicit two-part test that the Wood Court did not even have the occasion to quote" from *Cuyler*. 2001 WL 133196 at *10.

With all respect, we suggest that such a free translation of this Court's chosen language in *Wood* should be reviewed by this Court itself. The *Cuyler* and *Wood* opinions, containing noticeably different formulations of the operative test for a new trial, were both written by Justice Powell, a notably careful and precise author. The passage of his *Wood* opinion which the Fourth Circuit parsed as "shorthand" is *the dispositional paragraph*, setting out what the trial court was to do on remand. That is a peculiarly unlikely place for a careful jurist to write inexactly. Moreover, there are two broader reasons why a lower court should not have felt quite so free to disregard Justice Powell's explicit terminology.

First, there was no need to do so in order to harmonize *Cuyler*, *Wood*, and *Strickland* or avoid what the Fourth Circuit majority said would otherwise amount to *Wood*'s having "overruled by implication the second part of . . . [*Cuyler*'s] two-part standard" (2001 WL 133196 at *9). To the contrary, there was no disharmony among *Cuyler*, *Wood* and *Strickland* to begin with, for, as the dissenting judges below pointed out:

> "Holloway, Sullivan, and Wood deal with three separate circumstances in which conflict of interest claims arise under the Sixth Amendment. The first is when a defendant objects to his representation on the basis of a conflict and the trial judge fails to inquire into the merits of the objection. See Holloway, 435 U.S. at 488-89. The second circumstance is when there is no objection to the representation, but the

> judge knew or should have known about an apparent conflict. If the judge fails to inquire in this situation, the defendant is only required to show that his lawyer labored under an actual conflict. See Wood, 450 U.S. at 273-74. The third circumstance is when there is no objection, and the conflict is not apparent to the judge. In that case, the defendant must show that his lawyer labored under an actual conflict and that the conflict adversely affected his lawyer's performance. See Sullivan, 446 U.S. at 348."

(2001 WL 133196 at *17.) And *Strickland* – which of course was not a conflict-of-interest case – said everything it had to say about the subject of conflict of interest in the course of describing the teachings of the *Holloway-Cuyler-Wood* line of cases.

Second, the Fourth Circuit majority's gloss on *Wood* disregards not only the language of *Wood* but the language of *Cuyler* and the logic of that language as well. This point, too, was made by the dissenting judges below. As they noted (2001 WL 133196 at *17), it was *Cuyler*, not *Wood*, that first qualified the *Cuyler* rule by saying that "**[u]nless the trial court knows or reasonably should know that a particular conflict exists**, the court need not initiate an inquiry" into an unchallenged potential conflict of interest (446 U.S. at 347), and the burden thus falls upon the defendant to demonstrate both an actual conflict and an adverse effect in order to establish a Sixth Amendment violation (446 U.S. at 348 - 350). *Cuyler anticipated* the holding in *Wood* and – like *Wood* later – drew a distinction between the rules applicable to Sixth Amendment adjudication of conflict claims in cases where "the trial court knows or reasonably should know that a particular conflict exists" and cases where s/he does not. In light of this distinction, the dissenters below correctly observe that the *en banc* Fourth



Circuit majority's

> "analysis fails as a matter of logic. The majority holds that in every case where there was no objection, the convicted defendant (in order to obtain relief) must show actual conflict and adverse effect, regardless of whether there was an apparent conflict when the case was tried. Under the majority's rule, it makes no difference whether the trial judge had a constitutional duty to inquire because the defendant must always prove the same two conditions. . . . [*Cuyler*], however, dictates that there is a distinction between cases in which the trial judge has a duty to inquire and those in which he does not. As a result, it is simply wrong to hold every defendant to the same burden regardless of whether the trial court was under a duty to investigate an apparent conflict. Wood v. Georgia makes that clear." (2001 WL 133196 at *18.)

Simply put, the *en banc* majority has not only edited *Wood*'s language but made a cipher of its holding and an absurdity of *Cuyler*'s own careful statement – which *Wood* quoted (450 U.S. at272 n.18) – excepting cases in which "the trial court knows or reasonably should know that a particular conflict exists" from *Cuyler*'s no-duty-to-inquire rule and its attendant two-part requirement of showing actual prejudice *and* adverse effect in order to obtain a new trial on Sixth Amendment conflict-of-interest grounds. Mickens' case is squarely within that exception; and a Fourth Circuit ruling which *accepts that he is within it* and yet holds that *Cuyler* requires him "to establish that his attorney's conflict of interest adversely affected his lawyer's performance" and that *Wood* "does not *relieve* him of this burden, even when the trial court has failed to inquire into a potential conflict about which it reasonably should have been aware" (2001 WL 133196 at *14) reduces *Cuyler* as well as *Wood* to an incoherency that this Court should not leave unreviewed.

**ISSUE 3:**

**The Fourth Circuit's Substitution of a Subjective, Motivational "Link" Inquiry for the Unremarkable Requirement of *Cuyler* that a Conflict of Interest Must Affect the Adequacy of Counsel's Representation**

The second large issue on which the court below pronounced a decision sharply at odds with the rules that several other circuits have derived from this Court's Sixth Amendment precedents has to do with the "appropriate standard" for an inquiry into "adverse effect" (2001 WL 133196 at * 11). The Fourth Circuit *en banc* majority held that this standard requires not only a finding (1) that there were plausible lines of defense which the conflict-ridden lawyer failed to pursue, and (2) that these lines of defense were feasible as an alternative strategy on the facts known to conflict-ridden counsel, *but also* (3) "that counsel's failure to pursue that strategy . . . was linked to the actual conflict" (*id.*) This aspect of its decision is consistent with the law of the Eleventh Circuit (in cases where *Cuyler v. Sullivan* requires an inquiry into "adverse effect")[37] but appears to be inconsistent with the law of every other circuit (as that law has developed in the *Cuyler* context), insofar as we have been able to determine by research conducted under the time constraints imposed by Mr. Mickens' April 17 execution date.

It is clear and uncontroversial that where *Cuyler* requires a showing of "adverse effect," *some* relationship or "link" must be established between counsel's actual conflict

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[37] *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999) (*en banc*). See note 33 *supra*.



of interest and counsel's performance. This is implicit in the very concept of adverse *effect*. The most widely used touchstone among the circuits for testing this relationship is the inquiry posed in *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985): whether some plausible defensive strategy not pursued by conflict-ridden counsel "was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests."[38]

The *Fahey* test has been adopted by the First, Second, and Third Circuits.[39] It provides two disjunctive means of showing adverse effect. If a defendant manages to elicit evidence of his or her lawyer's subjective mental processes and shows that the lawyer's choice among alternative potentially viable defensive strategies was "due to" the lawyer's conflicting interests, of course that constitutes an "adverse effect." But in the more usual situations where the lawyer denies having made decisions in this flagrantly unethical fashion, or where the lawyer's motivations are compound or obscure, a defendant can establish "adverse effect" *objectively*, by showing that some viable unused

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[38] The relevant passage from *Fahey*, 769 F.2d at 836, reads:

> "In order to establish an actual conflict the petitioner must show two elements. First, he must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests."

[39] *United States v. Soldevila-Lopez*, 17 F.3d 480, 486 (1st Cir. 1994); *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993); *Lopez v. Scully*, 58 F.3d 38, 41 (2d Cir. 1995); *United States v. Morelli*, 169 F.3d 798, 810 (3d Cir. 1999); *Hess v. Mazurkiewicz*, 135 F.3d 905, 910 (3d Cir. 1998).

strategy "was inherently in conflict with . . . the attorney's other loyalties or interests."[40] Similarly, under the rules developed by the Seventh, Ninth and Tenth Circuits, an "adverse effect" can be established objectively, through the showing of an inherent conflict between "'a specific and seemingly valid or genuine alternative strategy . . . [and counsel's] duties to others or . . . his own personal interests.'"[41]

The "link" demanded by the Fourth Circuit – not simply a link between counsel's conflict and counsel's *performance* but a link between counsel's conflict and the "failure

[40] *Fahey*, 769 F.2d at 836. *Fahey* added the subjective ("due to") half of its disjunctive formula to the objective ("inherently in conflict") half which it adopted from *Brien v. United States*, 695 F.2d 10, 15 (1st Cir. 1982) ("In order to establish an actual conflict of interest, the petitioner ordinarily must prove two elements. First, he must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. . . . He need not show that the defense would necessarily have been successful if it had been used, but merely that it possessed sufficient substance to be a viable alternative. . . . Second, he must establish that the alternative defense was inherently in conflict with the attorney's other loyalties or interests." Some circuit opinions continue to use the original *Brien* formulation. *E.g.*, *United States v. Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990) ("'Actual conflict' and 'adverse effect' are not self-defining phrases, . . . but in the context of the instant case, we hold that defense counsel's performance was adversely affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests.").

[41] *United States v. Migliaccio*, 34 F.3d 1517, 1526 (10th Cir. 1994). See *Church v. Sullivan*, 942 F.2d 1501, 1512 (10th Cir. 1991); *Stoia v. United States*, 22 F.3d 766, 771 (7th Cir. 1994) ("An adverse effect occurs, if, but for the attorney's actual conflict of interest, there is 'a [reasonable] likelihood that counsel's performance somehow would have been different."); *Lipson v. United States*, 233 F.3d 942, 946 (7th Cir. 200); *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992) ("To establish that a conflict of interest adversely affected counsel's performance, the defendant need only show that some effect on counsel's handling of particular aspects of the trial was 'likely'."); *Mannhalt v. Reed*, 847 F.2d 576, 581 - 583 (9th Cir. 1988).



to pursue . . . [an available alternative] strategy" (2001 WL 133196 at*11) – is quite another matter. It focuses on counsel's *motivation*, counsel's *reasons* for taking or forgoing particular lines of defense, and it essentially makes counsel's hindsight testimony decisive of the issue of adverse effect. This is why the *en banc* majority, in approving the district court's conclusion that there was no "link" between any conflict of interest and Saunders' failures to pursue various defensive strategies, treats the district court's fact findings based upon acceptance of Saunders' credibility[42] as centrally important.[43] It is also why the majority dismisses the palpable ways in which Saunders' representation of Hall created interests and loyalties that were intrinsically inconsistent with lines of

[42] See, *e.g.*, 74 F. Supp.2d at 606 ("Without condoning the inexcusable failure to disclose the previous representation of Hall, the Court finds that, as a factual matter, Saunders did not believe that any 'continuing duties to [a] former client[ ] [might] interfere with his consideration of all facts and options for his current client'" ); 74 F. Supp.2d at 612 ( "When all is said, the Court credits Saunders' testimony that he did not refrain from taking any actions for Mickens because of his earlier representation of Hall."). As we have seen (in note 20 *supra*) the district court credited Saunders' denial of any connection between his representation of Hall and his failures to pursue leads to potential defenses for Mickens that would have tarnished Hall *even when the best alternative explanation that the district court could find for these failings was "no reason . . . other than Saunders' lack of perspicacity or perhaps indolence.*"

[43] "We conclude that the district court's findings are largely factual and are not clearly erroneous. Because we agree with the district court that many of Mickens' assertions of adverse effect were not viable defense strategies and that any viable defense strategies were not linked to his attorney's conflict of interest, we reject Mickens' Sixth Amendment challenge to his conviction based on the theory that the claimed conflict had an adverse effect on the representation of his attorney." 2001 WL 133196 at 13. See also *id.* at * 10 ("Because much of the adverse effect inquiry is heavily fact dependent, we believe appropriate deference should be given to the findings of the district court.").

defensive strategy Saunders might have pursued but did not pursue in Mickens' case.[44]

This Fourth Circuit approach to adjudicating issues of adverse effect is out of line

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[44] The vacated panel decision below found the following inconsistencies particularly significant:

> "Saunders did not investigate (or attempt to develop) any negative information about Hall, the victim of the crime Mickens allegedly committed. Yet the circumstances of this crime (murder and sodomy) suggested that some consideration had to be given to investigating the character and background of the victim. There were no witnesses to Hall's murder, which occurred in a secluded area that was a 'known gathering place for homosexuals,' Mickens, 74 F.Supp.2d at 607. Saunders knew from his representation of Hall that Hall had some tendency to violence or aggressiveness and that for some reason he was no longer living at home, despite his young age. This information, together with the notable location of Hall's murder, at least suggested an investigation into whether consent to the sodomy and self-defense to the murder might be defenses or statutory mitigators. . . . Because of Saunders' duty to protect Hall's secrets and confidences, he could not even *consider* an investigation that was suggested by the circumstances." (2000 WL 1292972 at *11.)

> "Saunders' duty to conduct a reasonable investigation created still another conflicting interest. Because this was a capital case, there was a good chance that someone from the victim's family (perhaps Hall's mother) would testify during the penalty phase. . . . Surely this would require defense counsel to consider investigating the victim's relationship with key family members, especially (in this case) the victim's mother since the victim was a juvenile. Here, Saunders, while he represented Hall, learned something about his relationship with his mother and about the fact that he no longer lived at home. In particular, Saunders learned about the circumstances leading to the charge that Hall had 'grabbed [his mother] by the arms and shoved her to the ground' shortly before his death. Mickens, 74 F.Supp.2d at 599. This confidential or secret information that Saunders had about some aspects of Hall's relationship with his mother also created a conflict: Saunders' interest in preserving Hall's confidences diverged from Mickens' interest in having Saunders consider an investigation into Hall's relationship with his mother." (2000 WL 1292972 at *12.)



with the principles that other circuits have endorsed to govern the adverse-effect inquiry:

> "We give no weight to the post-trial hearing or findings regarding the need for cross-examination on [prosecution witness] Goldfine's first grand jury appearance or [defense counsel] Kelly's thought processes in that regard. First, the applicable standard requires only the demonstration of a conflict inconsistent with a plausible trial strategy or tactic. Cross-examination regarding Goldfine's failure to mention document tampering and her perjury as to [defendant] Delli Bovi's handwriting, even if not mandatory, was certainly a plausible strategy. Second, after-the-fact testimony by a lawyer who was precluded by a conflict of interest from pursuing a strategy or tactic is not helpful. Even the most candid persons may be able to convince themselves that they actually would not have used that strategy or tactic anyway, when the alternative is a confession of ineffective assistance resulting from ethical limitations."

*United States v. Malpiedi*, 62 F.3d 465, 470 (2d Cir.1995); *accord*: *Perillo v. Johnson*, 205 F.3d 775, 807 (5th Cir. 2000); and see *Brien*, quoted in note 34 above. It is also out of line with the core principles of this Court's conflict-of-interest cases since *Holloway*: – that the Sixth Amendment entitles an accused to counsel who is not beset by conflicting obligations, and that when counsel's loyalties are riven by such a conflict, reconstruction of the reasons s/he forbore to pursue available defense strategies is both impractical and needless. See *Holloway*, 435 U.S. at 489 - 490. Each of these gross misalignments presents a classic case for *certiorari*. See this Court's Rule 10, subdivisions (a) and (c).

## ISSUE 4:

**The Fourth Circuit's Application of its "Link"Requirement so as to Disregard the Insights of *Holloway* and Conflate the Doctrines of *Cuyler* and *Strickland***

The final step in the *en banc* majority's analysis was to apply its "link" requirement to the facts of Mickens' case, finding that counsel's "strategic decision [regarding one or another possible line of investigation or defense] was unrelated to . . . [his] conflict of interest" (2001 WL 133196 at * 12; see also *id.* at *13), so that "any viable defense strategies were not linked with . . . [the] conflict of interest" (*id.*). This analysis raises two additional issues deserving review on *certiorari* because it marks a radical departure from principles laid down by *Holloway* and *Strickland v. Washington*.

First, by relying on the very record made by conflict-ridden counsel as the source of the essential *facts* to be used in making the "heavily fact dependent" determination whether counsel's strategic judgments were or were not linked with counsel's conflict of interest (2001 WL 133196 at * 10; see also *id.* at *13), the *en banc* majority flouts the holding in *Holloway* that a record made by a conflict-ridden lawyer is – for that precise reason – too unreliable a basis for Sixth Amendment adjudication. *Holloway* teaches that "the evil . . . [of a conflict of interest] is in what the advocate finds himself compelled to *refrain* from doing," 435 U.S. at 490. So, for example, when Saunders concededly failed to investigate leads suggesting the possibility of a consensual-sodomy defense, it misses the whole point of *Holloway* to rely on Mickens' trial testimony denying that he killed Hall as the basis for concluding that Saunders' investigative failings had no adverse effect on the defense. Had the investigation been pursued and produced evidence weakening the prosecution's chances of proving forcible sodomy – the sole basis for its capital



murder case – Saunders might have developed a defense that did not depend on Mickens' testimony and might then have advised and persuaded Mickens not to take the stand at trial. Or Saunders might have avoided a trial completely by using that evidence to overcome the prosecutor's unwillingness to negotiate a non-capital murder disposition, born of confidence that he would have no trouble proving the forcible-sodomy predicate.

> "It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of [the trial and] sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible."

*Holloway*, 435 U.S. at 490 - 491.

Second, in pursuing the "link" inquiry by asking whether Saunders had a reasonable basis, apart from the conflict itself, for his choice of defense strategies (2001 WL 133196 at * 12 - *13), the *en banc* majority effectively requires the same showing of unreasonable judgment on the part of conflict-ridden counsel that would constitute incompetence on the part of a lawyer *not* saddled with a conflict. (Indeed, in rejecting one of Mickens' arguments about a possible defense strategy that his lawyer failed to pursue, the majority actually says that a choice to forgo this strategy "cannot be the mark of incompetent counsel by any measure." 2001 WL 133196 at * 12.) This analysis makes an utter hash out of *Strickland*'s recognition that conflict-of-interest cases cannot be assimilated into the general rules governing ineffective assistance of counsel because

"counsel . . . burdened by an actual conflict of interest . . . breaches the duty of loyalty, perhaps the most basic of counsel's duties . . . [and] it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." (466 U.S. at 692.)

## CONCLUSION

The decision of the Fourth Circuit in this case addresses important Sixth Amendment issues of general applicability and answers them in questionable ways that are difficult to square with this Court's pertinent opinions and impossible to square with the construction of those opinions by various other federal and state courts. With respect to two of the major issues, there is some support for the Fourth Circuit's ruling in the welter of incompatible lower-court caselaw, but the confusion reflected by that welter is all the more reason for this Court to take the issues up. Mickens' case presents an unusually good vehicle for this Court's consideration of the entire set of connected issues because, in order to reject Mickens' conflict-of-interest claim on the compelling facts at bar, the Fourth Circuit *en banc* majority had to decide all of the issues against him *seriatim* in a series of rulings leading to an extreme result. *Certiorari* should be granted.

Respectfully submitted,

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(3)

No. 00-9285

IN THE
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2000

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WALTER MICKENS, JR.,

*Petitioner,*

v.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON,

*Respondent.*

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# APPENDIX TO
## PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**Imminent Execution Scheduled**
**April 17, 2001**

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United States Court of Appeals,
Fourth Circuit.

**Walter MICKENS, Jr., Petitioner-Appellant,**
**v.**
**John B. TAYLOR, Warden, Sussex I State Prison, Respondent-Appellee.**

**No. 00-4.**

Argued Dec. 5, 2000.
Decided Feb. 16, 2001.

Following affirmance of capital murder conviction and death sentence, 247 Va. 395, 442 S.E.2d 678, and affirmance of death sentence after remand for a new sentencing hearing, 252 Va. 315, 478 S.E.2d 302, petition for writ of habeas corpus was filed. The United States District Court for the Eastern District of Virginia, Robert E. Payne, J., 74 F.Supp.2d 586, denied petition, and petitioner appealed. The Court of Appeals, 227 F.3d 203, reversed. On rehearing en banc, the Court of Appeals, Widener, Circuit Judge, held that: (1) claim of conflict of interest on the part of lead trial counsel was not barred under the requirement of exhaustion or the doctrine of procedural default; (2) even if the trial court failed to inquire into a potential conflict on the part of defense counsel about which it reasonably should have known, automatic reversal was not required, absent objection by the defense; (3) petitioner was required to establish both an actual conflict of interest and an adverse effect even if the trial court failed to inquire into a potential conflict; (4) petitioner must show link between adverse effect and actual conflict; and (5) petitioner failed to show adverse effect.

Affirmed.

Michael, Circuit Judge, filed a dissenting opinion, in which Diana Gribbon Motz and King, Circuit Judges, joined.

West Headnotes

**[1] Federal Courts k744**
170Bk744

When Court of Appeals sits en banc, it reviews the decision of the district court for error. U.S.Ct. of App. 4th Cir.Rule 35(c), 28 U.S.C.A.

**[2] Criminal Law k641.5(.5)**
110k641.5(.5)

A criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel unhindered by conflicts of interest. U.S.C.A. Const.Amend. 6.

**[3] Criminal Law k1517**
110k1517

**[3] Criminal Law k1519(1)**
110k1519(1)

The *Strickland* standard for establishing ineffective assistance of counsel applies equally in federal collateral proceedings as it does on direct appeal, but there are exceptions to the standard, and a claim of ineffective assistance of counsel arising from counsel's conflict of interest presents a special case subject to the standard articulated by *Cuyler v. Sullivan*. U.S.C.A. Const.Amend. 6.

**[4] Criminal Law k641.5(.5)**
110k641.5(.5)

To establish ineffective assistance of counsel

on conflict of interest grounds, a petitioner must establish that (1) his attorney labored under an actual conflict of interest that (2) adversely affected his lawyer's performance, and after a petitioner satisfies this two-part test, prejudice is presumed. U.S.C.A. Const.Amend. 6.

**[5] Habeas Corpus k314**
197k314

**[5] Habeas Corpus k319.1**
197k319.1

The "exhaustion doctrine" bars a claim if it is raised for the first time in a federal habeas petition, while the "procedural default doctrine" bars a claim when the habeas petitioner fails to exhaust available state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.

**[6] Habeas Corpus k407**
197k407

A habeas petitioner can establish cause for procedural default and related lack of exhaustion by showing that the factual basis for the claim was unavailable to him at the time he filed his state habeas petition.

**[7] Habeas Corpus k407**
197k407

The factual predicate for habeas petitioner's conflict of interest claim, that lead defense counsel in petitioner's murder trial had represented the victim in an unrelated matter, was not available to petitioner in state court nor was it discoverable through the exercise of diligent investigation, and thus the claim was not barred under the requirement of exhaustion or the doctrine of procedural default, where it was only through a clerk's mistake that federal habeas counsel saw victim's juvenile court file, which was confidential under state law, and trial counsel had remained silent as to the prior representation. U.S.C.A. Const.Amend. 6; Va.Code 1950, § 16.1-305.

**[8] Criminal Law k1166.10(3)**
110k1166.10(3)

Even if the trial court failed to inquire into a potential conflict on the part of defense counsel about which it reasonably should have known, automatic reversal was not required where there was no showing of any hindrance of the defense and no objection by the defense to the conflict. U.S.C.A. Const.Amend. 6.

**[9] Criminal Law k641.5(.5)**
110k641.5(.5)

An objection raised by defense counsel is particularly persuasive evidence of a Sixth Amendment violation based on counsel's conflict of interest because: (1) defense counsel is in the best position to evaluate his potential conflicts of interest; (2) defense attorneys are obligated to inform the court of conflicts of interest; and (3) attorneys are officers of the court whose declarations to the court are virtually made under oath. U.S.C.A. Const.Amend. 6.

**[10] Criminal Law k641.5(7)**
110k641.5(7)

Trial courts have an obligation to inquire into potential conflicts of interest on the part of defense counsel when they know or reasonably should know of a particular conflict. U.S.C.A. Const.Amend. 6.

**[11] Criminal Law k641.5(.5)**
110k641.5(.5)

To establish ineffective assistance of counsel



arising from counsel's conflict of interest, defendant was required to establish both an actual conflict of interest and an adverse effect even if the trial court failed to inquire into a potential conflict about which it reasonably should have known. U.S.C.A. Const.Amend. 6.

**[12] Courts k90(1)**
106k90(1)

Overruling by implication is not favored.

**[13] Criminal Law k842**
110k842

**[13] Criminal Law k846**
110k846

Claims of conflict of interest on the part of defense counsel present mixed questions of law and fact that Court of Appeals reviews de novo, but the habeas court's factual findings are subject to the clearly erroneous standard. Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

**[14] Criminal Law k641.5(.5)**
110k641.5(.5)

A defendant has established an adverse effect from counsel's conflict of interest if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another, and adverse effect can arise at any stage of the litigation, including pretrial investigation or entry of a plea. U.S.C.A. Const.Amend. 6.

**[15] Criminal Law k641.5(.5)**
110k641.5(.5)

To establish adverse effect from counsel's conflict of interest, and thus ineffective representation, defendant was not required to establish that he would have prevailed at trial had counsel pursued the strategies that defendant now argues counsel rejected because of his conflict of interest. U.S.C.A. Const.Amend. 6.

**[16] Habeas Corpus k721(3)**
197k721(3)

Habeas petitioner must establish by a preponderance of the evidence adverse effect from trial counsel's conflict of interest. U.S.C.A. Const.Amend. 6.

**[17] Criminal Law k641.5(.5)**
110k641.5(.5)

There is a three-part standard for showing by defendant of an adverse effect from trial defense counsel's conflict of interest; first, the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued; second, the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts of the case; and, finally, the petitioner must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict. U.S.C.A. Const.Amend. 6.

**[18] Criminal Law k641.5(.5)**
110k641.5(.5)

Habeas petitioner failed to show that any actual conflict of interest of lead defense counsel at trial for murder and attempted forcible sodomy, based on fact the counsel had been representing victim on an unrelated matter at the time of his death, had an adverse effect on the defense, so as to constitute ineffective assistance, in that many of petitioner's assertions of adverse effect were not viable defense strategies and any viable defense strategies were not linked to his attorney's conflict of interest; petitioner asserted, inter alia, that his attorney failed to

raise as a defense that victim had consented to sodomy, failed to investigate victim's background or to present any negative information about victim at trial, and failed to engage in meaningful plea negotiations. U.S.C.A. Const.Amend. 6.

**[19] Habeas Corpus k380.1**
197k380.1

Habeas petitioner's claims of inadequate investigation by trial counsel, and of insufficient evidence, were defaulted where he had not fairly presented them to the state courts.

**[20] Criminal Law k641.13(7)**
110k641.13(7)

Defense counsel was not ineffective in failing to retain a mental health expert to evaluate defendant for the resentencing, where defendant had been examined by a psychiatrist on the motion of counsel and defendant did not establish what new information a mental health expert would have discovered beyond what counsel already knew at the time of the resentencing. U.S.C.A. Const.Amend. 6.

**[21] Habeas Corpus k406**
197k406

Ineffective assistance by state habeas counsel fails to establish cause for default of claims of ineffective assistance of trial counsel raised for the first time in federal habeas petition.

**[22] Criminal Law k641.13(1)**
110k641.13(1)

The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding, and that guarantee does not guarantee an ideal or perfect representation. U.S.C.A. Const.Amend. 6.

***351 ARGUED:** Robert James Wagner, Wagner & Wagner, Richmond, Virginia, for Appellant. Robert Quentin Harris, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellee. **On BRIEF:** Robert E. Lee, Jr., Virginia Capital Representation Resource Center, Richmond, Virginia, for Appellant. Mark L. Earley, Attorney General of Virginia, Office of the Attorney General, Richmond, Virginia, for Appellee.

Before WILKINSON, Chief Judge, and WIDENER, WILKINS, NIEMEYER, LUTTIG, WILLIAMS, MICHAEL, MOTZ, TRAXLER, and KING, Circuit Judges.

Affirmed by published opinion. Judge WIDENER wrote the majority opinion, in which Chief Judge WILKINSON and Judges WILKINS, NIEMEYER, LUTTIG, WILLIAMS, and TRAXLER joined. Judge MICHAEL wrote a dissenting opinion, in which Judge MOTZ and Judge KING joined.

**OPINION**

WIDENER, Circuit Judge:

In 1993 a jury in the Circuit Court of the City of Newport News, Virginia convicted Walter Mickens (Mickens) of the capital murder of Timothy Hall (Hall). Mickens was sentenced to death. Mickens' federal habeas attorney later discovered during the preparation of Mickens' federal habeas corpus petition that Mickens' trial counsel had just previously represented Hall on a charge unrelated to Hall's death. Mickens argues that, because of this prior representation, his attorney labored under a conflict of interest that rendered his representation of Mickens inadequate to satisfy Mickens' Sixth Amendment guarantee of effective counsel. Principally, because



Mickens has failed to show that such conflict of interest adversely affected the quality of his representation, we deny Mickens' petition for habeas corpus relief. We hold the incidental claims of Mickens are also without merit.

I.

We describe the facts of this crime as they have been summarized by the Supreme Court of Virginia, *Mickens v. Commonwealth*, ***352** 247 Va. 395, 442 S.E.2d 678, 681-83 (1994). See 28 U.S.C. § 2254(e)(1).

On March 28, 1992, Timothy Hall, age seventeen, lived with his fourteen-year- old friend, Raheem Gordon, and Gordon's father in Gordon's Newport News, Virginia apartment. Hall and Gordon often shared clothes, and Hall was wearing his roommate's Nike brand "Cross Trainer" tennis shoes on that night. Between 7:00 and 8:00 p.m. that evening, Hall drove young Gordon to a party in a nearby apartment building. Hall's stated intention was to return to the party later in the evening, but he never arrived.

Around 8:00 p.m., shortly after Gordon's arrival at the party, two other guests at the party, Vincent West and Bruce Mitchell, left the party and went to a nearby convenience store. After leaving the convenience store, West and Mitchell took their purchases to a public park adjacent to the apartment building in which the party was held. While sitting in the park, West and Mitchell saw a man with a bicycle hiding in some bushes and looking at them. The man was later identified as the petitioner, Walter Mickens.

The following day, Gordon saw Hall's automobile parked near the site of the party in the same place it had been parked the previous night. On March 30, 1992, two days after the party, a man walking along the James River in Newport News saw a body beneath an abandoned construction company building. The body was lying face down on a mattress under a sheet of plywood. The body was nude from the waist down, except for socks, and its legs were spread apart. Pubic hairs were recovered from the buttocks of the body. There were bloody "transfer" stains on the outsides of the victim's thighs, and there was a white liquid substance close to his anus. The victim was identified as Timothy Hall.

An autopsy revealed that Hall had suffered 143 separate "sharp force injuries." The medical examiner concluded that Hall had bled to death and that 25 of the wounds were fatal, including stab wounds to the lungs, skull and brain, liver, neck and jugular vein. The examiner opined that the fatal wounds may not have caused instant death, that Hall could have lived as long as 30 to 40 minutes after infliction of the last wound and that, during this time, he may have been conscious.

On the evening of April 4, 1992, five days after Hall's body was found, Officer D.A. Seals and Detective Dallas Mitchell of the Newport News police responded to a complaint that a black male traveling on a bicycle had assaulted a juvenile. They soon found Mickens, who is black, riding a bicycle in the parking area of the abandoned construction company building where Hall's body had been found. When Officer Seals displayed his badge and approached Mickens, Mickens fled on his bicycle. Mitchell and Seals followed Mickens and took him into custody as he was being detained by other officers. They arrested Mickens on charges involving the assault on the juvenile.

Mickens agreed to talk with the police after being advised of his Miranda rights.

Without telling Mickens how Hall had been murdered, Detective Mitchell told Mickens that he knew Mickens had killed Hall. Mickens denied any involvement in Hall's murder asserting, "You didn't find any knife on me, did you?" The following morning, the police obtained warrants charging Mickens with the murder and attempted sodomy of Hall. When Officer Seals handed Mickens the warrants, Mickens said, "I accept the warrants; I accept the charges." Seals asked Mickens what he meant by that, and Mickens responded, "Mother f___ r, if I told you I accept the warrants that means I'm guilty, don't it?"

On April 7, 1992, the police found Michael Jacobs wearing the Nike brand "Cross Trainer" shoes that Hall borrowed from Gordon and had been wearing when Gordon last saw him alive. Jacobs testified that he bought the shoes from Mickens ***353** for $5.00 the previous week, the same week Hall's body was found.

At trial, expert witnesses presented by the Commonwealth testified that the pubic hairs removed from Hall's buttocks were from an African-American and were alike in "all identifiable microscopic characteristics" to the pubic hair sample taken from Mickens. Tissue attached to the roots of the hairs indicated that the hairs had been forcibly removed, possibly by the rubbing of the assailant's genitals against Hall's buttocks. A sample of human sperm was recovered from the cover of the mattress on which Hall's body was found. DNA analysis (RFLP type) of the sample revealed that Hall could not have produced the sperm. Mickens' DNA pattern was consistent with the DNA pattern in the sperm, however. According to expert testimony presented by the Commonwealth, approximately one in 27,000 Caucasians, one in 6,000 African-Americans, and one in 2,000 Hispanics could have produced sperm consistent with the sample taken from the mattress.

The Commonwealth also presented the testimony of Tyrone Brister, who had been confined in a holding cell at the courthouse with Mickens on March 26, 1993, about a year after Hall's murder. Brister testified that he had asked Mickens why he was in the holding cell and Mickens answered, "They said I stabbed somebody 140 something times in the head." Mickens then lowered his voice and said, "which I did." Mickens also told Brister that "they" said he also sodomized the victim and stole his sneakers. Again, Mickens lowered his voice and said, "which I did."

Mickens was convicted of the capital murder of Timothy Hall under a statute making it a capital offense to commit a premeditated murder during or following the commission of attempted forcible sodomy. See Va.Code Ann. § 18.2-31(5). The jury found that the murder of Timothy Hall was outrageously and wantonly vile and sentenced Mickens to death. The Supreme Court of Virginia affirmed. See *Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678 (1994). The United States Supreme Court granted Mickens' first petition for certiorari and remanded the case "for further consideration in light of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994)." *Mickens v. Virginia*, 513 U.S. 922, 115 S.Ct. 307, 130 L.Ed.2d 271 (1994). On remand the Supreme Court of Virginia concluded that *Simmons* mandated a new sentencing hearing because "the jury was entitled to be informed of Mickens' parole ineligibility." *Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9, 10 (1995). [FN1] On February 5-8, 1996, the trial court held a new sentencing hearing. The jury again fixed Mickens' sentence at death. Mickens appealed, the Supreme Court of Virginia affirmed the sentence, *Mickens v. Commonwealth*, 252 Va. 315, 478 S.E.2d 302, 307 (1996), and the United States Supreme Court denied certiorari, *Mickens v. Virginia*, 520 U.S. 1269, 117 S.Ct. 2442, 138 L.Ed.2d 202 (1997). The Supreme Court of Virginia denied Mickens' petition for a writ of habeas corpus on December 15, 1997.

FN1. Mickens previously had been twice convicted of robbery, not to mention other convictions. See Va.Code § 53.1-151(B1).

On June 25, 1998, Mickens filed a petition in federal district court for a writ of habeas corpus under 28 U.S.C. § 2254 (2000). While investigating Mickens' case, Mickens' court-appointed federal habeas counsel was the first to discover that Mickens' lead trial counsel, Bryan Saunders (Saunders), labored under a potential conflict of interest. [FN2] The Federal habeas attorney had gone to the Newport News Juvenile and Domestic Relations Court to review Mickens' juvenile case file. While there, counsel also asked the clerk on duty ***354** for any files involving Timothy Hall. Although juvenile case files are kept confidential under Virginia law, see Va. Code Ann. § 16.1-305, the clerk mistakenly produced Hall's file. Hall's juvenile file revealed that, at the time of Hall's death, Saunders was representing him on assault and concealed weapon charges. The assault charge originated on February 21, 1992, when Hall's mother swore out a warrant alleging that her son repeatedly had grabbed her by her arms and shoved her to the ground. Hall was charged again on March 13, 1992, when the Newport News police found him in possession of a concealed weapon, a serrated bread knife wrapped in paper. When Hall appeared before the Juvenile and Domestic Relations Court on March 20, 1992, Judge Paul Criver, Jr. appointed Saunders to represent Hall on the two charges. A hearing in the matter was continued until April 3, 1992. Sometime between March 20 and March 28, 1992, when Hall was last seen alive, Hall came to Saunders' office for an interview that lasted between fifteen and thirty minutes. They discussed the circumstances surrounding each of the charged crimes.

FN2. We take the facts relating to Saunders' representation of Mickens from the decision of the district court denying Mickens' petition for federal habeas corpus relief. See *Mickens v. Greene*, 74 F.Supp.2d 586 (E.D.Va.1999).

On Friday, April 3, 1992, four days after Hall's body was discovered, Judge Aundria Foster of the Juvenile and Domestic Relations Court dismissed the charges against Hall, noting that he was deceased. Judge Foster's handwritten order was entered on the individual docket sheet for Hall's case. The docket sheet was a single page that included Hall's full name, his date of birth, the charges against him, an abbreviated history of the proceedings, and the identity of his appointed lawyer, Bryan Saunders. That same day Saunders went to the courthouse for the scheduled hearing in Hall's case, and someone, Saunders does not recall whom, told him that Hall was dead and that the case had been dismissed. There is no evidence that Saunders appeared before Judge Foster on the day that the charges against Hall were dismissed. Mickens was arrested the next day, Saturday, April 4, 1992. On the following Monday, April 6, 1992, Judge Foster, the same judge who handled the dismissal of Hall's case, appointed Saunders to represent Mickens in his trial for the capital murder of Hall. Mickens' arrest warrants, which appear to have been before Judge Foster when she appointed Saunders, charged that "on or about March 30, 1992" Mickens murdered "Timothy Jason Hall, white male, age 17, by stabbing, and during the commission of an abduction, and sodomy as well as robbery." [FN3] Judge Foster did

not inquire into whether Saunders would have a conflict in representing Mickens.

> FN3. The robbery and abduction charges were later dismissed for lack of probable cause by Judge Foster at Mickens' preliminary hearing.

Saunders represented Mickens at the guilt phase of his murder trial and at both of his sentencing hearings. Saunders worked with court-appointed co- counsel, Warren Keeling, but Saunders was responsible for about ninety percent of the workload. Keeling took primary responsibility for the sentencing hearings, however. Neither Saunders nor Keeling represented Mickens on his petition for state habeas corpus relief. Saunders never told Mickens or Keeling that he had represented Hall, and Mickens did not learn about the prior representation until federal habeas counsel discovered it in Hall's juvenile file.

The district court denied Mickens' petition for federal habeas corpus relief. *Mickens v. Greene,* 74 F.Supp.2d 586 (E.D.Va.1999). The court rejected Mickens' conflict of interest claim after concluding that "the possible conflict of interest presented by Saunders' successive representation of Hall and Mickens never ripened into an actual conflict nor was Saunders' advocacy impaired thereby." *Mickens v. Greene,* 74 F.Supp.2d at 615. The district court also rejected Mickens' other claims, including those for ineffective ***355** assistance of counsel and insufficiency of evidence. Mickens appealed, and, on September 14, 2000, a divided panel of this court reversed the decision of the district court. See *Mickens v. Taylor,* 227 F.3d 203 (4th Cir.2000).

The Commonwealth's petition for rehearing en banc was granted, and on December 5, 2000, the case was argued before the en banc court. We now affirm.

[1] When this court sits en banc, we review the decision of the district court for error. See 4th Cir.R. 35(c). Because Mickens filed his federal habeas petition after the April 24, 1996, enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, we apply 28 U.S.C. § 2254 as amended by the AEDPA. See *Mueller v. Angelone,* 181 F.3d 557, 565-72 (4th Cir.), *cert. denied,* 527 U.S. 1065, 120 S.Ct. 37, 144 L.Ed.2d 839 (1999).

II.

[2][3] A criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel unhindered by conflicts of interest. See *Cuyler v. Sullivan,* 446 U.S. 335, 345-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *United States v. Tatum,* 943 F.2d 370, 375 (4th Cir.1991). The Supreme Court has most clearly articulated the threshold for establishing ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail, a petitioner alleging ineffective assistance of counsel must establish, (1) that his attorney's representation fell below an objectively reasonable performance and (2) that the inadequate performance prejudiced the petitioner's case. *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. This constitutional standard for establishing ineffective assistance of counsel applies equally in federal collateral proceedings as it does on direct appeal. *Strickland,* 466 U.S. at 697, 104 S.Ct. 2052.



[4] Even as the *Strickland* court clarified the applicable standard for ineffective assistance of counsel, however, it recognized special circumstances addressed by its prior decisions and noted exceptions to the new standard it articulated. The *Strickland* Court recognized that a claim of ineffective assistance of counsel arising from counsel's conflict of interest presents a special case subject to the standard articulated by *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). See *Strickland,* 466 U.S. at 692, 104 S.Ct. 2052. To establish ineffective assistance of counsel on conflict of interest grounds, a petitioner must establish that (1) his attorney labored under "an actual conflict of interest" that (2) "adversely affected his lawyer's performance." See *Sullivan,* 446 U.S. at 348. After a petitioner satisfies this two-part test, prejudice is presumed. *Sullivan,* 446 U.S. at 349, 100 S.Ct. 1708.

Mickens presents three alternative arguments for habeas corpus relief on conflict of interest grounds. First, Mickens argues that the trial court's failure to inquire into the extent of his attorney's potential conflict of interest even though the court reasonably should have known of that conflict mandates automatic reversal of his conviction. Second, Mickens argues that, even if the trial court's failure to inquire into his attorney's potential conflict does not require automatic reversal, it relieves him of his burden under *Sullivan* of establishing that the conflict of interest adversely affected his representation. Finally, Mickens argues that he has satisfied both elements of the two-part *Sullivan* test and that the district court erred in ruling that his attorney did not labor under an actual conflict of interest that adversely affected his representation. We conclude that *Sullivan* requires Mickens to establish both an actual conflict of interest and an adverse ***356** effect even if the trial court failed to inquire into a potential conflict about which it reasonably should have known. Because we find that Mickens has failed to show an adverse effect, we affirm the decision of the district court and deny Mickens' petition without deciding whether Mickens has demonstrated that his attorney labored under an actual conflict of interest.

[5] Before we examine the merits of Mickens' conflict of interest claim, we address the Commonwealth's argument that his claim is barred under the requirement for exhaustion and the doctrine of procedural default. The exhaustion doctrine bars a claim if it is raised for the first time in a federal habeas petition. See *Breard v. Pruett,* 134 F.3d 615, 619 (4th Cir.) (citing *Matthews v. Evatt,* 105 F.3d 907, 911 (4th Cir.1997)), *cert. denied,* 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998). The procedural default doctrine bars a claim when the habeas petitioner "fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.' " *Breard,* 134 F.3d at 619 (quoting *Coleman v. Thompson,* 501 U.S. 722, 735 n. *, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)).

[6][7] In a case in the procedural posture present here, a petitioner may overcome both the procedural default and related exhaustion bar by showing cause for the default and actual prejudice arising from the asserted constitutional error. See *Breard,* 134 F.3d at 620. A petitioner can establish cause by showing "that the factual basis for [the] claim was unavailable to him at the time he filed his state habeas petition." *Breard,* 134 F.3d at 620; see *McCleskey v. Zant,* 499 U.S. 467, 493-94, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); *Williams v. French,* 146 F.3d 203, 209 (4th Cir.1998). The district court concluded that Mickens established cause: "Here, Saunders' silence

and state law requirements for secrecy of juvenile court records operated together to preclude Mickens from raising the conflict of interest claims in his state habeas petition." *Mickens v. Greene,* 74 F.Supp.2d at 600. The Commonwealth argues that if Mickens' federal habeas counsel was able to discover Saunders' prior representation of Hall, then Mickens' state habeas counsel also could have done so. Virginia law, however, requires juvenile court records to be kept confidential and prohibits their production absent a court order. See Va.Code Ann. § 16.1-305. As the district court found, "the fortuitous circumstances by which federal habeas counsel discovered the truth about Saunders' conflict prove beyond question that Mickens did not fail in his duty to inquire in the state court proceedings." *Mickens v. Greene,* 74 F.Supp.2d at 601 (citing *Amadeo v. Zant,* 486 U.S. 214, 224, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988)). It was only through a clerk's mistake that federal habeas counsel saw Hall's juvenile court file, and as soon as a supervisor discovered the error, the file was taken from federal habeas counsel. Under these circumstances, we agree with the district court that "the factual predicate for [the conflicts claim] was not available to Mickens in state court nor was it discoverable through the exercise of diligent investigation." *Mickens v. Greene,* 74 F.Supp.2d at 602. Mickens has established cause.

To establish prejudice adequate to excuse his default, a petitioner must show that his counsel's error created more than the "possibility of prejudice" but instead that it "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady,* 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). The Supreme Court has identified Sixth Amendment conflict of interest cases as a special circumstance, however, in which prejudice for purposes of the ineffective assistance of counsel inquiry is presumed once a petitioner establishes both of the ***357** two aspects of the underlying conflict of interest claim. See *Sullivan,* 446 U.S. at 349-50, 100 S.Ct. 1708. Our inquiry as to prejudice for purposes of excusing Mickens' default thus incorporates the test for evaluating his underlying conflict of interest claim. See *Williams,* 146 F.3d at 212-13 (analyzing actual prejudice for purposes of procedural default by examining the merits of petitioner's conflict of interest claim); *Rosenwald v. United States,* 898 F.2d 585, 587 (7th Cir.1990) (concluding that to show actual prejudice the petitioner must establish the merits of his *Sullivan* claim). Accordingly, we turn to the merits of Mickens' conflict of interest claim.

III.

A.

[8] Mickens argues that the Sixth Amendment mandates automatic reversal of his conviction because the trial court reasonably should have known of his attorney's potential conflict of interest but failed to inquire into the extent of that conflict. Mickens cites *Holloway v. Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), and *Wood v. Georgia,* 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), in support of this proposition. We accept for purposes of discussion, without deciding the issue, that Judge Foster, who appointed Saunders to represent Mickens, reasonably should have known that Saunders labored under a potential conflict of interest arising from his previous representation of Hall.

We are of opinion, however, that the decision in *Holloway v. Arkansas* does not require automatic reversal of Mickens' conviction. *Holloway* dealt with a specific circumstance, not present here, in which a



trial court failed to inquire into a potential conflict despite defense counsel's objections. In *Holloway,* the trial court required one defense attorney to represent three co-defendants in a joint trial despite repeated objections by defense counsel that the joint representation hampered his ability to represent any of the defendants adequately. Notably, he could not cross-examine any of those from whom he had confidential information. *Holloway,* 435 U.S. at 478-80, 98 S.Ct. 1173. The *Holloway* trial court declined to inquire into prejudice arising from the conflicted representation. While the state court affirmed the two convictions, the Supreme Court reversed the convictions based solely on the trial court's failure, in the face of repeated representations by the single attorney of his impossible burden, to either ascertain the risk of joint representation or appoint separate counsel. *Holloway,* 435 U.S. at 483-84, 98 S.Ct. 1173.

[9] The *Holloway* Court cited two reasons for finding a Sixth Amendment violation under such circumstances: the obligation of the trial court to protect the right of the accused to have effective assistance of counsel and the trustworthiness of defense counsel's objection that his representation is hampered by a conflict of interest. *Holloway,* 435 U.S. at 484-85, 98 S.Ct. 1173. An objection raised by defense counsel is particularly persuasive evidence of a Sixth Amendment violation because: (1) defense counsel is in the best position to evaluate his potential conflicts of interest; (2) defense attorneys are obligated to inform the court of conflicts of interest; and (3) attorneys are officers of the court whose declarations to the court are "virtually made under oath." *Holloway,* 435 U.S. at 485-86, 98 S.Ct. 1173. The Court stated "We find these considerations persuasive." We think that the rule of *Holloway* should not apply in a case such as this where there has been no showing of any hindrance of the defense and no objection by the defense to the conflict. In fact, *Holloway* specifically declined to clarify the extent of a trial court's obligation to inquire into a conflict of interest absent an objection by the defense. *Holloway,* 435 U.S. at 483-84, 98 S.Ct. 1173.

Following *Holloway,* the Court, in *Cuyler v. Sullivan,* again addressed a trial court's duty to inquire into conflicts of ***358** interest, noting that a trial court must inquire into a conflict of interest when it "knows or reasonably should know that a particular conflict exists." *Sullivan,* 446 U.S. at 347, 100 S.Ct. 1708. The *Sullivan* Court did not extend the *Holloway* reversal rule, however, beyond the facts of *Holloway* to all circumstances in which the defense did not object to a conflict of interest at trial. Absent such an objection, a petitioner must satisfy the two-part conflict-of-interest standard identified by *Sullivan,* establishing both an actual conflict and an adverse effect. The *Sullivan* Court recognized this distinction when it noted that "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan,* 446 U.S. at 348, 100 S.Ct. 1708. [FN4]

> FN4. While the cases may seem to emphasize lack of objection, we think that the fact of the associated failure to offer to a defendant an opportunity to object to or waive objection to questionable representation is also of consequence.

[10] Mickens argues that a footnote in *Wood v. Georgia* changed the rule of *Sullivan* and extended the automatic reversal rule of *Holloway* to circumstances in which a trial court ignores a conflict about which it reasonably should have known. *Wood,* 450 U.S. at 273 n. 18, 101 S.Ct. 1097. [FN5] In *Wood,* the Court addressed a conflict of interest issue apparent on the face of the

record even though the conflict had not been addressed below. *Wood,* 450 U.S. at 262-63, 101 S.Ct. 1097. Because the case arose as an appeal from a revocation of probation, the Court analyzed the conflict under the due process clause, rather than Sixth Amendment grounds. *Wood,* 450 U.S. at 271-72, 101 S.Ct. 1097. Nonetheless, the Court cited *Sullivan* for the proposition that the Sixth Amendment ensures a right to counsel free from conflict of interest. *Wood,* 450 U.S. at 271, 101 S.Ct. 1097. Without the benefit of briefing, the *Wood* Court could not determine whether defense counsel in the case before the Court labored under an actual conflict of interest. *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. The record was adequate to establish, however, "that the possibility of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the [trial] court a duty to inquire further." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. The court noted that "any doubt as to whether the court should have been aware of the [conflict] problem is dispelled by the fact that the [prosecution] raised the conflict problem explicitly" at trial. *Wood,* 450 U.S. at 272-73, 101 S.Ct. 1097. The *Wood* Court thus clarified that trial courts have an obligation to inquire into potential conflicts of interest when they know or reasonably should know of a particular conflict. The Supreme Court remanded the case and instructed the trial court "to determine whether the conflict of interest that this record strongly suggests actually existed." *Wood,* 450 U.S. at 273, 101 S.Ct. 1097. However, and we emphasize, the Court did *not* find a due process violation, rather, the Court held that, "Instead, we remand this case for further findings concerning a possible due process violation." *Wood,* 450 U.S. at 263, 101 S.Ct. 1097.

> FN5. That part of the footnote is: "Moreover, *Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' "

While Mickens, of course, should not be faulted for advocating the adoption of what he argues is an automatic reversal rule in the *Wood* footnote, we are of opinion that the adoption of such a rule requiring reversal in such cases would be an overly literal application of the language in that footnote. We say this for three reasons. [FN6]

> FN6. We recognize that one circuit has apparently applied *Wood* to create a rule of automatic reversal for cases in which a trial court has-failed to inquire into a conflict about which it reasonably should have known. See *Ciak v. United States,* 59 F.3d 296, 302 (2d Cir.1995) (reversing a conviction on the grounds that "the Supreme Court in *Wood v. Georgia* stated that *Cuyler* ... requires reversal where a trial court neglects its duty to inquire about a particular conflict") (citations omitted). Several of the circuits, including our own, have cited the automatic reversal rule but have not applied it to reverse a conviction. See *United States v. Tatum,* 943 F.2d 370, 379 (4th Cir.1991); *United States v. Crespo de Llano,* 830 F.2d 1532, 1538 (9th Cir.1987); *United States v. Cirrincione,* 780 F.2d 620, 625 (7th Cir.1985); *United States v. Burney,* 756 F.2d 787, 791 (10 Cir.1985). One other circuit, however, has read *Wood* as we do. See *Brien v. United States,* 695 F.2d 10, 15 n. 10 (1st Cir.1982) (rejecting the automatic reversal rule because the *Wood* court "did not require an automatic reversal of the conviction but merely remanded the case to enable the trial court to conduct the necessary inquiry, the implication being that the convictions would only be overturned if an actual conflict were found").



***359** First, the decision itself in the *Wood* case, as we have noted, did not reach the merits of the due process issue. The decision remanded the case for further findings concerning a possible due process violation.

Second, footnote 18 in the *Wood* case was in response to the aspect of Justice White's dissent which took issue with jurisdiction to vacate the judgment on a Constitutional ground. Reading that footnote to require reversal in each case in which the trial court has failed to make an inquiry when it might know or should know of a conflict, we think leads to an application of the footnote of the court beyond that which was intended.

Third, in our own case of *United States v. Tatum,* we also *referred* to footnote 18 in *Wood, Tatum,* 943 F.2d at 379, but we *applied* the rules of *Strickland* and *Sullivan,* that there are two requirements for relief in such cases, "an *actual conflict* of interest resulting in an *adverse effect* on counsel's performance," *Tatum,* 943 F.2d at 375 (italics in original), and we went on to show that there was an adverse effect on counsel's performance, pretrial strategies were adversely affected in that case, one trial counsel was dependent on another for aid in the defense, and obvious avenues for a full defense were not pursued. *Tatum,* 943 F.2d at 380.

Thus, we are of opinion that the intervening footnote 18 in *Wood* did not change the rule of *Strickland* and *Sullivan.* No adverse effect on the representation of Mickens by his trial attorney having been shown, we hold that there was no Constitutional error shown in this case to require a vacation of Mickens' conviction on account of the fact that Saunders had represented Hall on an entirely unrelated charge at the time of Hall's death at the hands of Mickens.

B.

[11][12] Mickens now asserts an alternative reading of the *Wood* decision in his opposition to rehearing that we now address. Mickens argues that, even if *Wood* does not compel automatic reversal of his conviction, it relieves him of his burden under *Sullivan* of establishing an adverse effect on his representation in a case where the trial court failed to inquire into a potential conflict about which it reasonably should have known. Mickens notes that the *Wood* Court remanded to the trial court "to determine whether the conflict of interest that this record strongly suggests actually existed" with an instruction to award a new hearing if "an actual conflict of interest existed at that time" but did not expressly require the trial court to identify an adverse effect. *Wood,* 450 U.S. at 274, 101 S.Ct. 1097. Mickens concludes from this remand instruction that the *Wood* court eliminated the adverse effect requirement in cases where the trial court failed to inquire into a conflict of interest about which it reasonably should have known. *Wood,* 450 U.S. at 273, 101 S.Ct. 1097. Thus, Mickens reads *Wood* to have overruled by implication the second part of *Sullivan*'s two-part standard. However, "[o]verruling by implication is not favored." *Catawba Indian Tribe of South Carolina v. South Carolina,* 978 F.2d 1334, 1347 (4th Cir.1992).

***360** But the *Wood* Court noted that "[o]n the record before us, we cannot be sure whether counsel was *influenced in his basic strategic decisions* by the interests of the employer who hired him." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097 (emphasis added). *If defense counsel had been so influenced,* the

Court stated, "the due process rights of petitioners were not respected." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. After these observations, the Court concluded that it was difficult "to determine whether an actual conflict of interest was present." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. Those comments underscore that the Court was searching the record not just for a conflict of interest, but also for some indication that the conflict adversely affected the attorney's representation of the defendants. When read in this light, the *Wood* Court's terse instruction to the trial court on remand cannot bear the constitutional weight Mickens ascribes to it. The Court used the term "actual conflict" to refer to a conflict of interest that has adversely affected defense counsel's "basic strategic decisions." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. As this court has recognized, the two requirements of the *Sullivan* test, "an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap." *Tatum,* 943 F.2d at 375. The *Wood* Court's instruction to the trial court amounts to no more than shorthand for an explicit two-part test that the *Wood* Court did not even have occasion to quote in its majority decision, much less to overrule. Thus, we hold that *Wood* does not relieve Mickens of showing an adverse effect on his attorney's representation.

C.

We now turn to Mickens' argument that the district court erred in deciding that any actual conflict of interest did not adversely affect his representation by Saunders. Because *Sullivan* requires Mickens to demonstrate both an actual conflict and an adverse effect and because we find that Mickens has failed to identify an adverse effect, as noted, we do not reach his argument that he has established an actual conflict of interest.

[13] Conflicts claims present "mixed questions of law and fact that we review de novo." *Williams v. French,* 146 F.3d 203, 212 (4th Cir.) (citing *Sullivan,* 446 U.S. at 342, 100 S.Ct. 1708), *cert. denied,* 525 U.S. 1155, 119 S.Ct. 1061, 143 L.Ed.2d 66 (1999). The district court's factual findings, however, "are subject to the clearly erroneous standard set forth in Rule 52(a), Fed.R.Civ.P." *Fields v. Attorney General,* 956 F.2d 1290, 1297 n. 18 (4th Cir.1992). Because much of the adverse effect inquiry is heavily fact dependent, we believe appropriate deference should be given to the findings of the district court. In this respect, we note that a significant part of the testimony was taken orally, and the district judge saw the witnesses and heard them testify. We also note that the opinion of the district court was complete, thorough, and thoughtful.

[14][15] A defendant has established an adverse effect if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another. See *Tatum,* 943 F.2d at 376. Thus, both taking action and failing to take actions "that are clearly suggested by the circumstances" can indicate an adverse effect. *Tatum,* 943 F.2d at 376. An adverse effect can arise at any stage of the litigation including pretrial investigation or entry of a plea. See *Tatum,* 943 F.2d at 376. In this case, Mickens argues that Saunders' continuing duty to Hall prevented him from taking action and pursuing strategies on behalf of Mickens. Of course, *Sullivan* does not require Mickens to establish that he would have prevailed at trial had Saunders pursued the strategies that Mickens now argues Saunders rejected because of his conflict of interest.

***361** [16][17] Based on our holding in *Tatum,* 943 F.2d at 376, we agree with the district court's articulation of a three-part standard for showing an adverse effect which, as in any other civil action, Mickens must establish by a preponderance of the evidence. *Mickens v. Greene,* 74 F.Supp.2d at 603-04 (citing *Freund v. Butterworth,* 165 F.3d 839, 860 (11th Cir.1999) (en banc)). We add that *Freund* is not different in any significant way from our cases of *Williams v. French,* 146 F.3d 203, 212-13 (4th Cir.1998), and *Tatum,* 943 F.2d at 376. First, the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision. In the language of *Tatum,* the petitioner must show that the alternative strategy or tactic was "clearly suggested by the circumstances." *Tatum,* 943 F.2d at 376. Finally, the petitioner must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.

Mickens challenges this standard, arguing that neither this circuit nor the Supreme Court has required a petitioner to establish a link between an adverse effect and an actual conflict. Such a link is implicit, however, in the Supreme Court's requirement that a petitioner show that "his counsel actively represented conflicting interests" and "that a conflict of interest actually affected the adequacy of his representation." *Sullivan,* 446 U.S. at 350, 349, 100 S.Ct. 1708. As this court has noted, the two requirements, "an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap." *Tatum,* 943 F.2d at 375. We conclude that the district court applied the appropriate standard to evaluate the adverse effects asserted by Mickens.

[18] The district court carefully considered each of Mickens' claims of adverse effect. Mickens argues that his attorney failed to raise as a defense that Hall had consented to sodomy; failed to investigate Hall's background or to present any negative information about Hall at trial; failed to engage in meaningful plea negotiations; failed to present evidence at sentencing regarding Hall's pending charges or strained relationship with his mother; failed to share information with his co-counsel; failed to investigate leads indicating an alternative perpetrator of the crime; failed to investigate Hall's juvenile file; and failed to adequately cross-examine a key prosecution witness. The district court considered each of these arguments in detail.

The district court concluded that a consent defense was not viable because of evidence that Hall had been subjected to a choke hold and stabbed some 140 times before or during the act of sodomy or attempted sodomy. *Mickens v. Greene,* 74 F.Supp.2d at 607. In addition, the district court noted that Mickens denied ever meeting Hall. *Mickens v. Greene,* 74 F.Supp.2d at 607. Because Saunders was entitled to rely on the information provided by his client, consensual sodomy was not a viable defense strategy at the time that Saunders made his decision not to pursue it. See *Royal v. Taylor,* 188 F.3d 239, 248-49 (4th Cir.1999); *Roach v. Martin,* 757 F.2d 1463, 1476-80 (4th Cir.1985).

Neither was the district court persuaded that Mickens suffered an adverse effect because of Saunders' failure to investigate or to raise negative information about Hall. The district court concluded that Saunders did not possess sufficient information relating to rumors that Hall was a male prostitute to warrant an investigation and that, in any event, presentation of such evidence would have been counter-productive and would

have been inconsistent with Mickens' assertions of sympathy for the victim and his family. *Mickens v. Greene,* 74 F.Supp.2d at 608. By the same ***362** token, the district court concluded that evidence related to Hall's assault charge on his mother would have been of limited value. The only conceivably admissible purpose for the evidence would have been impeachment of Hall's mother at the sentencing hearing after she testified about the extent of her grief. *Mickens v. Greene,* 74 F.Supp.2d at 608. Choosing not to vilify the mother of the victim cannot be the mark of incompetent counsel by any measure. For obvious reasons, questioning the mother on that point would have been an unattractive strategy. Ultimately, Saunders' co-counsel was primarily responsible for the sentencing hearing, was aware of this information, and made the decision not to use it at the sentencing hearing; so this strategic decision was unrelated to Saunders' conflict of interest. *Mickens v. Greene,* 74 F.Supp.2d at 608.

The district court also concluded that Saunders' failure to pursue plea negotiations was not based on his conflict of interest but rather on the unwillingness of the prosecution to bargain. *Mickens v. Greene,* 74 F.Supp.2d at 609. The district court found as a nonviable strategy Mickens' argument that evidence should have been introduced as to Hall's claimed assault on his mother, and we agree. Not only was it inconsistent with Mickens' expression of regret for the mother's pain, proving that a decedent has asked for what he got is a defense better reserved for the defense of prosecutions such as murder and manslaughter. *Mickens v. Greene,* 74 F.Supp.2d at 609-10.

The district court also concluded that Saunders' failure to investigate into matters identified by Mickens was either harmless or unrelated to Saunders' conflict of interest. *Mickens v. Greene,* 74 F.Supp.2d at 610-12. In particular, the district court attributed Saunders' failure to inquire into leads as to possible alternative perpetrators of the murder to the weak nature of the leads, rather than to Saunders' conflict of interest. *Mickens v Greene,* 74 F.Supp.2d at 611-12. The district court also found that Saunders' failure to investigate Hall's juvenile file, while unreasonable, created no adverse effect on Saunders' representation of Mickens because the file contained no information pertinent to Mickens' case. *Mickens v. Greene,* 74 F.Supp.2d at 611. The district court rejected Mickens' claim that Saunders failed adequately to cross-examine a key prosecution witness as defaulted for failure to raise the issue in state court. *Mickens v. Greene,* 74 F.Supp.2d at 595-96. In any event, Mickens has failed to establish any link between the failure to adequately cross-examine the witness and Saunders' potential conflict of interest.

Finally, the district court considered and rejected Mickens' contention that Saunders concealed his prior representation of Hall from his co-counsel out of a conflicting personal interest in remaining assigned to the case. *Mickens v. Greene,* 74 F.Supp.2d at 612-13. We conclude that the district court's findings are largely factual and are not clearly erroneous. Because we agree with the district court that many of Mickens' assertions of adverse effect were not viable defense strategies and that any viable defense strategies were not linked to his attorney's conflict of interest, we reject Mickens' Sixth Amendment challenge to his conviction based on the theory that the claimed conflict had an adverse effect on the representation of his attorney.

IV.

[19] Mickens' other allegations of error are easily addressed. Mickens argues that the district court erred in rejecting his claims for ineffective assistance of counsel. Mickens offers two grounds upon which his representation may be found ineffective under *Strickland:* his trial counsels' inadequate pretrial investigation and failure of his trial counsel to request a psychiatric evaluation for the resentencing. The first of these claims is that counsel were ineffective because they failed to investigate or to request an investigator for the ***363** purpose of gathering evidence for a consent defense and for use in mitigation at sentencing. The district court held that Mickens' claims of inadequate investigation were defaulted because he had not fairly presented them to the Virginia courts. See *Matthews v. Evatt,* 105 F.3d 907, 911 (4th Cir.1997). We agree with the district court. See *Mickens v. Greene,* 74 F.Supp.2d at 598.

[20] Mickens' second ineffective assistance claim focuses on his counsels' failure to retain a mental health expert to evaluate him for the resentencing. The district court rejected this argument on the merits, it appearing that Mickens had been examined by a psychiatrist on the motion of Saunders. On appeal, Mickens has not established what new information a mental health expert would have discovered beyond what counsel already knew at the time of the resentencing. Moreover, this claim was adjudicated against Mickens on the merits in state court. See *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (ruling that 28 U.S.C. § 2254(d)(1) prohibits federal court from granting habeas corpus relief with respect to claim adjudicated on the merits in state court unless the resulting decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court). We also reject this claim.

Mickens also challenges the sufficiency of the evidence supporting his conviction for attempted forcible sodomy. He further contends that absent sufficient proof of the predicate offense of forcible sodomy his capital murder conviction under Va.Code Ann. § 18.2-31(5) cannot stand. The district court concluded that this claim was defaulted because it was not fairly presented to the state courts. See *Matthews,* 105 F.3d at 911. Again, we agree with the district court. See *Mickens v. Greene,* 74 F.Supp.2d at 597.

[21] In his reply brief Mickens raises the argument that the ineffective assistance of his state habeas counsel excuses the default of additional ineffective assistance of counsel claims raised for the first time in his federal habeas petition. We have held that ineffective assistance by state habeas counsel fails to establish cause. See *Mackall v. Angelone,* 131 F.3d 442, 449 (4th Cir.1997) (en banc) ("Because [petitioner] has no right to effective assistance of counsel in his state habeas proceedings, he cannot demonstrate cause to excuse the procedural default of his claims that his trial and appellate counsel were constitutionally ineffective."). The district court held Mickens' additional claims defaulted on this ground. We adopt the district court's analysis on this issue. See *Mickens v. Greene,* 74 F.Supp.2d at 595.

V.

[22] In summary, "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance *necessary to justify reliance on the outcome of the proceeding.*" *Strickland,* 466 U.S. at 691-92, 104 S.Ct. 2052 (emphasis added). The Sixth Amendment guarantee of counsel does not guarantee an ideal or perfect representation. Thus, *Sullivan* requires a petitioner challenging his conviction on conflict of interest grounds to establish that his attorney's conflict of interest adversely affected his lawyer's performance. The

Supreme Court's decision in *Wood* does not relieve a petitioner of this burden, even when the trial court has failed to inquire into a potential conflict about which it reasonably should have been aware. Subsequent to *Wood*, the *Strickland* Court considered the arguments with respect to a rule of prejudice in conflict of interest cases but explicitly rejected a *per se* rule and found the rule to be "an actual conflict of interest adversely affected his lawyer's performance." *Strickland*, 466 U.S. at 692, 104 S.Ct. 2052. We reject the automatic reversal rule and conclude that Mickens must establish an adverse effect arising from his attorney's conflict of interest. ***364** We deny the other arguments of Mickens for the reasons stated above, and we deny his petition for habeas corpus relief.

Accordingly, the judgment of the district court is

*AFFIRMED*. [FN7]

FN7. The theme of the dissent is candid and is repeated in various forms and wordings from time to time. At first appearance, at p. 364, it is

When a trial judge ignores an apparent conflict, a defendant need *only* show that his lawyer labored under an actual conflict to establish a Sixth Amendment claim. The defendant is *not required* to show that the actual conflict adversely affected his lawyer's performance. (Italics added.)

While the theory is laudable, it searches for a perfect trial rather than a fair trial. It would plainly require a new trial although there is no adverse effect on the attorney's performance. So, even a defense as brilliant as that of Erskine would be impossible to justify if a technical conflict existed which had no effect on the performance. We do not believe that this is the law, and are of opinion that a technical conflict, as here, which had no effect on the performance of the attorney, is not such a structural error that vacation of a conviction by way of habeas corpus is called for.

MICHAEL, Circuit Judge, dissenting:

The lawyer appointed to defend Walter Mickens on a capital murder charge in Virginia had been representing the murder victim on criminal charges at the time of his death. The state judge who made the appointment was involved in both cases and knew or should have known of the apparent conflict. No one told Mickens about the conflict problem, so he could not object. Once the back-to- back representation came to light after Mickens had been sentenced to death, the apparent conflict proved to have been a real one. None of this poses a problem, according to the majority, because the lawyer did a passable job in defending Mickens. I respectfully dissent because there is a serious Sixth Amendment violation. A trial judge has a constitutional duty to look into an apparent conflict, even if there is no objection. *See Cuyler v. Sullivan*, 446 U.S. 335, 347, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). When a trial judge ignores an apparent conflict, a defendant need only show that his lawyer labored under an actual conflict to establish a Sixth Amendment claim. The defendant is not required to show that the actual conflict adversely affected his lawyer's performance. Here, the judge who appointed the lawyer for Mickens ignored the apparent conflict; and, as it turns out, the lawyer was actually saddled with a genuine conflict while he represented Mickens. Mickens's Sixth Amendment right to conflict-free counsel was therefore violated, and he is entitled to a new trial.



I.

On March 20, 1992, Bryan Saunders was appointed to represent Timothy Hall on assault and concealed weapon charges pending in Newport News, Virginia. (It was Hall's mother who had accused him of assaulting her.) Hall met promptly with Saunders, and they discussed the circumstances surrounding each of the charged crimes. Within a matter of days, on March 30, 1992, Hall's nude body was found near the James River, and foul play was evident. The gruesome nature of the crime against Hall was prominently reported by the news media. On April 3, 1992, state judge Aundria Foster dismissed the charges against Hall on account of his murder. Judge Foster's handwritten order of dismissal was entered on a single-page docket sheet that identified Saunders as Hall's lawyer. The next business day Judge Foster appointed Saunders to represent Mickens, who had been charged in Hall's murder. Despite the fact that Saunders was representing Hall on criminal charges at the time of his death, Judge Foster did not make any inquiry into whether Saunders would have a conflict in representing Mickens. As the district court concluded, Judge Foster knew, or should have known of the "apparent possible conflict." *Mickens v. Greene*, 74 F.Supp.2d 586, 613-15 (E.D.Va.1999).

***365** Because Saunders's loyalty was subject to question when he was appointed to represent Mickens, Saunders himself had the duty to inform Mickens of his prior representation of Hall and to give Mickens the opportunity to decline his services. *See* Va.Code Prof'l Responsibility DR 5-105(A) (Michie 1992). Saunders, however, said nothing to Mickens, or to the court for that matter. Saunders went on to represent Mickens at the guilt phase of his murder trial and at sentencing. Although Saunders was assisted by court-appointed co- counsel, Saunders was responsible for about ninety percent of the workload. Saunders never disclosed to his co-counsel that he had represented Hall. Several years after Mickens had been sentenced to death, Mickens's federal habeas counsel stumbled onto the fact that Saunders was representing the murder victim (Hall) at the time of the offense. That is the only reason we have this case today.

II.

The Sixth Amendment guarantees a defendant in a criminal case the right to effective assistance of counsel, and this includes the right to a lawyer who is free of conflicts of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 345- 50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Trial judges have a special duty to enforce the right to conflict-free counsel. *See generally Holloway v. Arkansas*, 435 U.S. 475, 484, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (emphasizing that " '[u]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused' ") (quoting *Glasser v. United States*, 315 U.S. 60, 71, 62 S.Ct. 457, 86 L.Ed. 680 (1942)). A series of three Supreme Court cases have clarified the duty of trial judges in policing conflict situations and have established what a defendant must show to obtain a new trial when the judge has ignored an apparent conflict.

In *Holloway* a public defender representing three defendants in a robbery and rape case moved on conflict grounds to have separate counsel appointed before the trial began. The trial judge "failed to take adequate steps" to explore the risks of a conflict and denied the motion. *Holloway*, 435 U.S. at 487, 98 S.Ct. 1173. The Court held that when a trial judge fails to inquire in such a circumstance, prejudice to the accused is presumed, and automatic reversal is

warranted. In other words, the defendants were not required to show that their lawyer labored under an actual conflict of interest or that an actual conflict adversely affected his performance. *See id.* at 488-89, 98 S.Ct. 1173. The *Holloway* Court explicitly left open the question of whether (or under what circumstances) the Sixth Amendment imposes an *independent* duty on a trial judge to inquire into a potential conflict when there is no objection or motion. *See id.* at 483-84, 98 S.Ct. 1173.

*Holloway* was followed by *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), where two privately retained lawyers represented three defendants who were accused of the same murders but tried separately. In *Sullivan* the only defendant to be convicted claimed that his right to conflict-free counsel had been violated even though there was no timely objection to the multiple representation. The Court said that the defendant's claim raised the issue "expressly reserved in *Holloway v. Arkansas,*" that is, "whether a state trial judge must inquire into the propriety of multiple representation even though no party lodges an objection." *Sullivan,* 446 U.S. at 345, 100 S.Ct. 1708. The Supreme Court held that "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* at 347, 100 S.Ct. 1708. In other words, a trial judge has a constitutional duty to inquire when a conflict is sufficiently apparent. Because the situation in *Sullivan* did not suggest that the trial judge should have reasonably known about any conflict, the judge was under no affirmative duty to inquire. *See id.* For that *366 particular situation--when the trial judge has no duty to inquire--the Court in *Sullivan* announced the defendant's burden for establishing a Sixth Amendment violation: he "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348, 100 S.Ct. 1708. *Sullivan,* however, did not articulate the defendant's burden when a trial court has a duty to inquire, but fails to fulfill it.

*Wood v. Georgia,* 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), answered the question left open in *Sullivan:* more specifically, what must a defendant demonstrate when he did not raise the conflict issue at trial, but the situation nevertheless triggered the judge's duty to inquire and the judge did nothing. In *Wood* two individual defendants in an obscenity case had been represented by a lawyer hired by their employer, and the record suggested that the employer might have been more interested in pressing broader legal principles than in seeking lenient treatment for its employees. *See id.* at 268, 272-74, 101 S.Ct. 1097. There was no objection to the representation, but the trial judge was faced with an "apparent" conflict, one that was clearly suggested by the circumstances. *See id.* at 262, 101 S.Ct. 1097. Because there was an apparent conflict, *Wood* held that the judge had a constitutional duty to inquire, despite the absence of an objection. *See id.* at 272-74, 101 S.Ct. 1097. This is consistent with *Sullivan,* which requires a trial court to "initiate an inquiry" when it "knows or reasonably should know that a particular conflict exists." *Sullivan,* 446 U.S. at 347, 100 S.Ct. 1708. In *Wood* the trial court's failure to fulfill its constitutional duty to inquire carried the following consequence, according to the Supreme Court:

> [The state] court should hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier. If the court finds that an actual conflict of interest existed at that time, and that there was no valid waiver of the right to independent counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests.

*Wood,* 450 U.S. at 273-74, 101 S.Ct. 1097. Simply put, the petitioners were only required to show an actual conflict. They were not required to show that the actual conflict adversely affected their lawyer's performance.

*Holloway, Sullivan,* and *Wood* deal with three separate circumstances in which conflict of interest claims arise under the Sixth Amendment. The first is when a defendant objects to his representation on the basis of a conflict and the trial judge fails to inquire into the merits of the objection. In this situation, the defendant is entitled to automatic reversal and a new trial. *See Holloway,* 435 U.S. at 488-89, 98 S.Ct. 1173. The second circumstance is when there is no objection to the representation, but the judge knew or reasonably should have known about an apparent conflict. If the judge fails to inquire in this situation, the defendant is only required to show that his lawyer labored under an actual conflict. *See Wood,* 450 U.S. at 273-74, 101 S.Ct. 1097. The third circumstance is when there is no objection, and the conflict is not apparent to the judge. In that case, the defendant must show that his lawyer labored under an actual conflict and that the conflict adversely affected his lawyer's performance. *See Sullivan,* 446 U.S. at 348, 100 S.Ct. 1708.

The majority's critical mistake is overlooking the careful distinction the Supreme Court made in *Sullivan* between the second and third situations. The distinction turns on whether the trial court faces an apparent conflict. The majority ignores this distinction and concludes that unless there is an objection--no matter how obvious the conflict might appear to the trial judge-- the defendant must still demonstrate both actual conflict and adverse effect *367 when the judge has failed in his constitutional duty to inquire.

The majority's mistake begins with its treatment of *Sullivan.* The Supreme Court in *Sullivan* held that whether or not there is an objection, a trial court has a duty to inquire into an apparent conflict. The Court was clear: "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* at 347, 100 S.Ct. 1708. The majority erroneously concludes that this statement is nothing more than a recitation of the *Holloway* holding, that is, a trial court must inquire into a conflict when there is an objection. *See ante* at 357-58. I respectfully suggest that the majority's reading is wrong for several reasons. First, if *Sullivan* was simply echoing *Holloway,* surely the Court would have cited *Holloway.* Instead, the Court cited to *Foxworth v. Wainwright,* 516 F.2d 1072, 1076-77 (5th Cir.1975), and *United States v. Medel,* 592 F.2d 1305, 1312-13 (5th Cir.1979), both of which stand for the principle that when a conflict is sufficiently apparent, a trial judge has a constitutional duty to inquire, even if there is no objection. [FN*] Second, the Court in *Sullivan* pointed out that the defendant's claim raised the issue "expressly reserved in *Holloway v. Arkansas,*" specifically, "whether a state trial judge must inquire into the propriety of multiple representation even though no party lodges an objection." *Sullivan,* 446 U.S. at 345, 100 S.Ct. 1708. The Court, therefore, was careful to explain that the defendant's claim raised an undecided issue: whether the trial court has any Sixth Amendment duty to inquire into a conflict situation when there is no objection. The Court decided this issue by declaring that a trial court "must initiate an inquiry" when it "knows or reasonably should know that a particular conflict exists." *Id.* at 347, 100 S.Ct. 1708. This statement was not a simple recitation of *Holloway's* holding, but rather a new constitutional rule. Third, the Court's actual analysis of whether "the trial court [knew] or reasonably should [have

known]" that a conflict existed shows that the Court was going beyond *Holloway*, where the presence of an objection dictated the outcome. The *Sullivan* Court, in deciding that the trial judge was under no duty to inquire, noted that there was no objection to the representation *and* that the defense strategy did not suggest a conflict. *See Sullivan*, 446 U.S. at 347, 100 S.Ct. 1708. If the defendant's Sixth Amendment claim had been only a *Holloway* claim, the lack of an objection would have (by itself) defeated the claim. There would have been no reason for the Court to explain that the defense strategy did not suggest the presence of any conflict. Fourth, the majority's reading of *Sullivan* is contrary to the plain language of the holding in the case. The Supreme Court said that a trial court has a duty to inquire if it "should have known" about a conflict. This means that the trial court's duty to inquire is not limited to situations where there is an actual objection. Accordingly, it is clear that *Sullivan* held that in the absence of an objection, a trial judge still has a duty to inquire if the conflict is sufficiently apparent.

FN* In *Foxworth* the Fifth Circuit vacated a conviction because the trial court failed to inquire into an apparent conflict, even though the record did not reflect an objection. *See* 516 F.2d at 1080 n. 17. Significantly, in these circumstances, the court held that a defendant need only show an actual conflict and need not show adverse effect. *See id.* at 1077 n. 7.
In *Medel* the Fifth Circuit said, "We ... reject [the defendants'] contention that the trial court was under an affirmative duty to inquire into the possibility of a conflict of interest. Defense counsel ... never indicated to the trial court that a conflict might exist. *Nor do we find anything in the record that should have alerted the Court to such a possibility.*" 592 F.2d at 1312-13 (emphasis added).

In light of *Sullivan* the majority's analysis fails as a matter of logic. The majority holds that in every case where there was no objection, the convicted defendant (in *368 order to obtain relief) must show actual conflict and adverse effect, regardless of whether there was an apparent conflict when the case was tried. Under the majority's rule, it makes no difference whether the trial judge had a constitutional duty to inquire because the defendant must always prove the same two conditions. *Sullivan*, however, dictates that there is a distinction between cases in which the trial judge has a duty to inquire and those in which he does not. As a result, it is simply wrong to hold every defendant to the same burden regardless of whether the trial court was under a duty to investigate an apparent conflict. *Wood v. Georgia* makes that clear.

This brings me to the majority's next critical mistake, its treatment of *Wood v. Georgia*. The plain language of *Wood* provides that when a trial court fails to fulfill its constitutional duty to inquire and there was no objection, a defendant is only required to establish an actual conflict. *Wood*, 450 U.S. at 273-74, 101 S.Ct. 1097. The majority does not deny that *Wood*'s remand instructions say as much. The majority, however, advances two reasons why we should not take *Wood* literally, but neither reason is persuasive. First, the majority says that to dispense with a showing of adverse effect, we must read *Wood* to have overruled *Sullivan* by implication. The majority then cites the canon that "overruling by implication is not favored." *Ante* at 359 (citing *Catawba Indian Tribe v. South Carolina*, 978 F.2d 1334, 1347 (4th Cir.1992)). However, as shown above, *Wood* did not overrule *Sullivan* in any way. Rather, *Wood* simply answered the question left open in *Sullivan*. As a result, the cited canon has no relevance to this case. Second, the majority claims that *Wood*'s reference to "actual conflict" in its holding is mere "shorthand" for requiring both actual conflict and adverse effect. *Ante* at 360. The majority arrives at this conclusion because the *Wood* Court, in discussing the facts of the case, questioned whether the lawyer's performance ("his basic strategic decisions") were influenced by a conflict. *See ante* at 360 (quoting *Wood*, 450 U.S. at 272, 101 S.Ct. 1097). The majority concludes that if only an actual conflict was required, the Court would not have made any reference to whether the lawyer's work had been affected. However, the fact that a lawyer's performance was affected can be evidence of an actual conflict. Of course, a defendant can establish that his lawyer labored under an actual conflict without showing a detrimental effect on the representation. Nevertheless, the fact that a lawyer fell down in his performance may be a strong indication that he did labor under an actual conflict. *See United States v. Tatum*, 943 F.2d 370, 375 (4th Cir.1991) ("The two requirements, an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap."). Therefore, it is not surprising that the *Wood* Court mentioned the quality of performance, even though the holding only required a showing that the lawyer labored under an actual conflict.

The final mistake the majority makes is not acknowledging the importance of *Sullivan* and *Wood* to our system of justice. Again, the Supreme Court distinguishes between the situation where the trial judge ignores an obvious conflict and the situation where the conflict is not apparent. This distinction takes into account the broader harm caused if a judge conducts a trial while ignoring an apparent conflict. Allowing a judge to ignore a conflict "invites disrespect for the integrity of the court," *Wheat v. United States*, 486 U.S. 153, 162, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) (internal quotations marks omitted), and "result[s] in the erosion of public confidence in the integrity of the bar and of the legal system." *United States v. Collins*, 920 F.2d 619, 627 (10th Cir.1990) (internal quotation marks omitted). Courts in our country "have an independent interest in ensuring that criminal trials are conducted within the ethical *369 standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat*, 486 U.S. at 160, 108 S.Ct. 1692. These concerns require us to treat a defendant's claim that a judge ignored an apparent conflict differently from other conflict of interest claims. The majority, however, treats all conflict claims the same, unless there is an objection. Under the majority's approach a defendant can be required to take a lawyer with divided loyalties so long as he does a tolerable job, and the defendant does not lodge a timely objection. The Sixth Amendment requires more. A criminal defendant has the right *from the outset of proceedings* to a lawyer who is free of conflicts. Yet the majority would impose no added consequence when a trial judge knowingly allows an unwitting defendant to proceed with a lawyer who has an apparent conflict. In this situation, the majority holds, the defendant's burden is the same as when the conflict is not known to the court until after a guilty verdict. In both cases, the defendant must show both an actual conflict and adverse effect, according to the majority. But under *Sullivan* and *Wood*, when the conflict is obvious and the trial judge ignores his duty (and opportunity) to see that the Sixth Amendment right is protected, the Supreme Court lessens the defendant's burden. He need only show that his lawyer had an actual conflict. This lower burden on defendants encourages trial courts to pay strict attention to fundamental rights, and it confirms that our system is dedicated

to ensuring fairness. The majority opinion, which goes against the decisions of the Supreme Court, does nothing to encourage trial courts to take the initiative in policing obvious conflicts of interest. That is unfortunate.

III.

The state judge faced (or actually created) an apparent conflict when she appointed Bryan Saunders to represent Walter Mickens in his capital murder case. The judge should have investigated the conflict problem at once and resolved it before it was too late. Instead, Mickens was put on trial and sentenced to death with a lawyer who labored under an actual conflict of interest. *See Mickens v. Taylor*, 227 F.3d 203, 213-17 (4th Cir.2000), *vacated & reh'g granted*, Oct. 23, 2000 (explaining why Mickens's lawyer had an actual conflict). Mickens must answer to the charge of capital murder, but he should answer through a lawyer whose representation is not clouded by a conflict. Because Mickens's Sixth Amendment right to conflict-free counsel was violated, I would award him a writ of habeas corpus unless the Commonwealth of Virginia grants him a new trial.

I respectfully dissent, and Judge Motz and Judge King join with me.

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United States Court of Appeals,
Fourth Circuit.

**Walter MICKENS, Jr., Petitioner-Appellant,**
**v.**
**John B. TAYLOR, Warden, Sussex I State Prison, Respondent-Appellee.**

**No. 00-4.**

Argued: June 6, 2000
Decided: Sept. 14, 2000
Rehearing En Banc Granted; Opinion Vacated Oct. 23, 2000.

Following affirmance of capital murder conviction and death sentence, 478 S.E.2d 302, petition for writ of habeas corpus was filed. The United States District Court for the Eastern District of Virginia, Robert E. Payne, J., 74 F.Supp.2d 586, denied petition, and petitioner appealed. The Court of Appeals, Michael, Circuit Judge, held that: (1) petitioner established cause excusing his failure to raise conflict of interest claim in state habeas proceedings; (2) trial judge knew or should have known about trial counsel's conflict of interest and, thus, had duty to inquire; (3) petitioner did not waive his right to conflict-free counsel; (4) counsel labored under actual conflict of interest; (5) certain claims of petitioner were procedurally defaulted; and (6) defense counsel's failure to obtain mental health expert to perform evaluation did not amount to ineffective assistance of counsel.

Reversed.

Widener, Circuit Judge, filed dissenting opinion.

***205 ARGUED:** Robert James Wagner, Wagner & Wagner, Richmond, Virginia, for Appellant. Robert Quentin Harris, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellee. **ON BRIEF:** Robert E. Lee, Jr., Virginia Capital Representation Resource Center, Richmond, Virginia, for Appellant. Mark L. Earley, Attorney General of Virginia, Office of the Attorney General, Richmond, Virginia, for Appellee.

Before WIDENER, MICHAEL, and MOTZ, Circuit Judges.

Reversed by published opinion. Judge MICHAEL wrote the majority opinion, in which Judge DIANA GRIBBON MOTZ joined. Judge WIDENER wrote a dissenting opinion.

**OPINION**

MICHAEL, Circuit Judge:

In 1993 a jury in Virginia state court convicted Walter Mickens of capital murder, and he was sentenced to death. Mickens' federal habeas counsel discovered something by chance that Mickens did not know: Mickens' lead counsel in his murder case was representing the murder victim on criminal charges at the time of the victim's death. The state judge who appointed counsel for Mickens knew or should have known that the back-to-back representation presented an apparent conflict, but the judge failed to inquire. This looks bad, but there is more. Mickens' lead counsel had an actual conflict of interest as a result of his representation of the murder victim. These circumstances, taken ***206** together, require that Mickens be afforded a new trial under the authority of *Wood v. Georgia*, 450 U.S.

261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). We therefore reverse the district court's judgment denying Mickens a writ of habeas corpus. The district court will award the writ on remand unless the Commonwealth of Virginia gives Mickens a new trial.

I.

We take the facts about the crime from the Supreme Court of Virginia, *Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678 (1994). *See* 28 U.S.C. § 2254(e)(1). On March 28, 1992, Timothy Hall, age seventeen, was living with his fourteen-year-old friend, Raheem Gordon, and Gordon's father in an apartment at 28th and Washington Streets in Newport News, Virginia. Between 7:00 and 8:00 p.m. that evening, Hall gave young Gordon a ride to the nearby Towers apartment building, where Gordon attended a party. Hall had intended to go to the same party later, but he never appeared. One item about Hall's dress that evening becomes important later: he was wearing a pair of Gordon's Nike brand "Cross Trainer" athletic shoes. At about 8:00 p.m. Vincent West and Bruce Mitchell, who were attending the Towers party, left and went to a nearby convenience store. After buying a few items and leaving the store, West and Mitchell went to a park next to the Towers building. While sitting in the park, West and Mitchell saw a man with a bicycle hiding in some bushes and looking at them. The man was later identified as the petitioner, Walter Mickens. Less than forty hours later, at about 12:30 p.m. on March 30, 1992, Chris Basford was walking along the James River in Newport News when he saw a body lying face down on a mattress beneath an abandoned construction company building. The body's legs were spread apart, and it was nude from the waist down, except for socks. The body was identified as that of Timothy Hall. Pubic hairs were recovered from the buttocks of Hall's body. There were bloody "transfer" stains on the outsides of his thighs, and there was a white liquid substance close to his anus. The autopsy by the medical examiner revealed that Hall had been subjected to 143 separate "sharp force injuries." The examiner concluded that Hall had bled to death and that twenty-five of the wounds were fatal. The examiner opined that the fatal wounds may not have caused instant death and that Hall could have lived as long as thirty to forty minutes after infliction of the last wound.

On the evening of April 4, 1992 (five days after Hall's body was found), the Newport News police, Officer D.A. Seals and Detective Dallas Mitchell, responded to a complaint that an African-American male, who was riding a bicycle, had assaulted a juvenile. Seals and Mitchell soon found Mickens riding a bicycle in the parking area at the abandoned construction company building. When Seals displayed his badge and approached Mickens, Mickens fled on his bicycle. He did not get far. Seals and Mitchell tracked Mickens down as he was being detained by other officers. Mickens was arrested at 7:00 p.m. on the charges involving the juvenile. After Mickens was given his Miranda warnings, he agreed to talk. Without telling Mickens how Hall had been murdered, Detective Mitchell told Mickens that he knew Mickens had killed Hall. Mickens denied any involvement in Hall's murder, but said, "You didn't find any knife on me, did you?" The following morning, the police obtained warrants charging Mickens with the murder and attempted sodomy of Hall. When Detective Seals handed Mickens the warrants, Mickens said, "I accept the warrants, I accept the charges." Seals asked Mickens what he meant by that, and Mickens responded, "Mother f___r, if I told you I accept the warrants that means I'm guilty, don't it?"

On April 7, 1992, the police found Michael



Jacobs wearing the Nike brand ***207** "Cross Trainer" shoes that Hall had been wearing when Raheem Gordon had last seen Hall alive. Jacobs testified that he had bought the shoes from Mickens for $5.00 the previous week (the week Hall's body was found).

The Commonwealth offered the following evidence through expert witnesses. The pubic hairs removed from Hall's buttocks were from an African-American and were alike in "all identifiable microscopic characteristics" to the pubic hair sample taken from Mickens, who is African-American. Tissue was attached at the roots of the hairs, indicating that the hairs had been forcibly removed, possibly by the rubbing of genitals against Hall's buttocks. The stain on the mattress cover was of human sperm. DNA analysis (RFLP type) revealed that Hall could not have produced the sperm. Mickens' DNA pattern matched the DNA pattern in the sperm, however. The approximate percentages of the population that could have deposited the sperm were one in 27,000 Caucasians, one in 6,000 African-Americans, and one in 2,000 Hispanics.

On March 26, 1993, about a year after Hall's murder, Mickens was in a holding cell at the courthouse with a man named Tyrone Brister. Brister testified about his encounter with Mickens. Brister asked Mickens why he was there, and Mickens answered, "They said I stabbed somebody 140 something times in the head." Mickens then lowered his voice and said, "which I did." Mickens also told Brister that "they" said he also sodomized the victim and stole his sneakers. Again, Mickens lowered his voice and said, "which I did."

The jury found Mickens guilty of the capital murder of Hall, specifically, murder during the commission of, or following, an attempted forcible sodomy. Mickens was sentenced to death, and the Supreme Court of Virginia affirmed. *See Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678 (1994). The United States Supreme Court granted his first petition for certiorari and remanded the case "for further consideration in light of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994)." *Mickens v. Virginia*, 513 U.S. 922, 115 S.Ct. 307, 130 L.Ed.2d 271 (1994). On remand the Supreme Court of Virginia concluded that *Simmons* mandated a resentencing because "the jury was entitled to be informed of Mickens' parole ineligibility." *Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9, 10 (1995). On February 5-8, 1996, the trial court held a new sentencing hearing. The jury again fixed Mickens' sentence at death. Mickens appealed, the Supreme Court of Virginia affirmed the sentence, *see Mickens v. Commonwealth*, 252 Va. 315, 478 S.E.2d 302, 307 (1996), and the Supreme Court denied certiorari, *see Mickens v. Virginia*, 520 U.S. 1269, 117 S.Ct. 2442, 138 L.Ed.2d 202 (1997). Mickens then pursued state post-conviction relief. The Supreme Court of Virginia summarily denied his petition for a writ of habeas corpus on December 15, 1997. Mickens then sought federal habeas corpus relief with the assistance of counsel appointed by the district court.

It was Mickens' federal habeas counsel who first discovered that Mickens' lead trial counsel, Bryan Saunders, labored under a conflict of interest. (The facts about the conflict issue are taken from the findings of the district court in Mickens' federal habeas proceeding.) While investigating Mickens' case, federal habeas counsel went to the Newport News Juvenile and Domestic Relations Court (JDR Court) to review Mickens' JDR file. While there, counsel also asked the clerk on duty for any files involving Timothy Hall. Although juvenile

case files are confidential and are not to be disclosed publicly without a court order, *see* Va.Code Ann. § 16.1-305, the clerk slipped up and produced Hall's file. This file revealed that at the time of Hall's death, Saunders was representing him on assault and concealed weapon charges. The first of these charges originated on February 21, 1992, when Hall's mother swore out a warrant ***208** for assault and battery against him. She said that her son had grabbed her by the arms and shoved her to the ground. Hall was booked again around March 13, 1992, when the Newport News police charged him with possession of a concealed weapon (a serrated bread knife wrapped in paper). Hall appeared before the JDR Court on March 20, 1992, when Judge Paul Criver, Jr. appointed Saunders to represent Hall on the two charges. A hearing in the matter was continued to April 3, 1992. Sometime between March 20 and March 28, 1992 (the day Hall was last seen alive), Hall came to Saunders' office for an interview that lasted between fifteen and thirty minutes. They discussed the circumstances surrounding each of the charged crimes.

On Friday, April 3, 1992, four days after Hall's body was discovered, Judge Aundria Foster of the JDR Court dismissed the assault and concealed weapon charges against Hall, noting that he was deceased. Judge Foster's handwritten order was entered on the individual docket sheet for Hall's case. The docket sheet was a single page that included Hall's full name, his date of birth, the charges, an abbreviated history of the proceedings, and the identity of his appointed lawyer, Saunders. That same day Saunders went to the courthouse for the scheduled hearing in Hall's case, and someone (Saunders does not recall whom) told him that Hall was dead and that the case had been dismissed. Mickens was arrested the next day, Saturday, April 4, 1992. On the following Monday, April 6, 1992, Judge Foster--the same judge who handled the dismissal of Hall's case--appointed Saunders to represent Mickens in his trial for the capital murder of Hall. Mickens' arrest warrants, which appear to have been before Judge Foster when she appointed Saunders, charged that "on or about March 30, 1992" Mickens murdered "Timothy Jason Hall, white male, age 17, by stabbing, and during the commission of an abduction, and sodomy as well as robbery." *Mickens v. Greene,* 74 F.Supp.2d 586, 614 (E.D.Va.1999). Judge Foster did not make any inquiry into whether Saunders would have a conflict in representing Mickens.

Following his appointment, Saunders represented Mickens at the guilt phase of his murder trial and at both of his sentencings. Saunders worked with court- appointed co-counsel, Warren Keeling, but Saunders was responsible for about ninety percent of the workload. Keeling did take the lead at the sentencings. Neither Saunders nor Keeling represented Mickens on his state habeas petition. Saunders never told Mickens (or Keeling) that he had represented Hall, and Mickens did not learn about it until federal habeas counsel saw Hall's JDR file.

On June 25, 1998, Mickens filed a petition in federal court for a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied the petition. That court rejected the conflict of interest claim after concluding that "the possible conflict of interest presented by Saunders' successive representation of Hall and Mickens never ripened into an actual conflict nor was Saunders' advocacy impaired thereby." *Mickens,* 74 F.Supp.2d at 615. The district court also rejected Mickens' other claims, including those for ineffective assistance of counsel and insufficiency of evidence. Mickens raises several issues on appeal, but he devotes most of his attention to the question of Saunders' conflict of interest.



Because Mickens filed his federal habeas petition after the April 24, 1996, enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, we apply 28 U.S.C. § 2254 as amended by AEDPA. *See Mueller v. Angelone,* 181 F.3d 557, 565-72 (4th Cir.), *cert. denied,* 527 U.S. 1065, 120 S.Ct. 37, 144 L.Ed.2d 839 (1999). We now turn to the issues.

II.

[1][2][3] The Sixth Amendment guarantees a defendant in a criminal case the ***209** right to effective assistance of counsel, which includes the right to representation that is free of conflicts of interest. *See Cuyler v. Sullivan,* 446 U.S. 335, 345-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Mickens argues that either of the following two circumstances mandates an award of the writ on conflict grounds: (1) the state court failed to inquire into Saunders' conflict of interest when it knew or should have known that a conflict existed, and (2) Saunders labored under an actual conflict of interest that adversely affected his representation. Conflicts claims present "mixed questions of law and fact that we review *de novo.*" *See Williams v. French,* 146 F.3d 203, 212 (4th Cir.1998) (citing *Sullivan,* 446 U.S. at 342, 100 S.Ct. 1708), *cert. denied,* 525 U.S. 1155, 119 S.Ct. 1061, 143 L.Ed.2d 66 (1999). Of course, the district court's underlying factual findings "are subject to the clearly erroneous standard set forth in Rule 52(a), Fed.R.Civ.P." *Fields v. Attorney General,* 956 F.2d 1290, 1297 n. 18 (4th Cir.1992).

A.

[4][5] Before we examine the merits of Mickens' conflicts claim, we address the Commonwealth's argument that this claim is barred under the requirement for exhaustion and the doctrine of procedural default. The exhaustion doctrine bars a claim if it is raised for the first time in a federal habeas petition. *See Breard v. Pruett,* 134 F.3d 615, 619 (4th Cir.) (citing *Matthews v. Evatt,* 105 F.3d 907, 911 (4th Cir.1997)), *cert. denied,* 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998). The procedural default doctrine bars a claim when the habeas petitioner "fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.' " *Id.* (quoting *Coleman v. Thompson,* 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)).

[6][7][8] A petitioner may overcome both the exhaustion and procedural default bars by showing cause and actual prejudice. *See Breard,* 134 F.3d at 620. A petitioner can establish cause by showing "that the factual basis for [the] claim was unavailable to him at the time he filed his state habeas petition." *Id. See also McCleskey v. Zant,* 499 U.S. 467, 493-94, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); *Williams,* 146 F.3d at 209. The district court concluded that Mickens established cause: "Here, Saunders' silence and state law requirements for secrecy of juvenile court records operated together to preclude Mickens from raising the conflict of interest claims in his state habeas petition." *Mickens,* 74 F.Supp.2d at 600. Juvenile files are confidential and may not be produced without court order. *See* Va.Code Ann. § 16.1-305. The Commonwealth nevertheless argues that if federal habeas counsel was able to discover the facts behind the conflicts claim, then Mickens could have done the same thing when he was developing his claims on state habeas. We disagree. As the district court found, "the fortuitous circumstances by which federal habeas counsel discovered the truth about Saunders' conflict prove beyond question that Mickens did not fail in his duty to inquire in the state

court proceedings." *Mickens*, 74 F.Supp.2d at 601 (citing *Amadeo v. Zant*, 486 U.S. 214, 224, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988)). It was only through a clerk's mistake that federal habeas counsel saw Hall's JDR file, and as soon as a supervisor discovered the error, the file was taken from federal habeas counsel. Under these circumstances, we agree with the district court that "the factual predicate for [the conflicts claim] was not available to Mickens in state court nor was it discoverable through the exercise of diligent investigation." *Mickens*, 74 F.Supp.2d at 602. Mickens has established cause.

[9][10] To establish prejudice to excuse his default, a petitioner must show that his counsel's error "worked to his actual and ***210** substantial disadvantage," not merely that the error "created a possibility of prejudice." *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) (emphasis omitted). In conflict of interest cases prejudice is presumed once a petitioner establishes the merits of the underlying claim. *See Sullivan*, 446 U.S. at 349-50, 100 S.Ct. 1708; *Wood v. Georgia*, 450 U.S. 261, 273-74, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). Our prejudice inquiry in this case thus incorporates the test for establishing the underlying conflict of interest claim. *See Williams*, 146 F.3d at 212-13 (analyzing actual prejudice by examining the merits of petitioner's conflict of interest claim); *Rosenwald v. United States*, 898 F.2d 585, 587 (7th Cir.1990) (concluding that to show actual prejudice the petitioner must establish the merits of his *Sullivan* claim). This means that we proceed directly to the merits of Mickens' conflict of interest claim.

B.

[11][12][13] Mickens' first conflict argument is that he must be retried for the following reason: the state judge who appointed Saunders to represent him on the capital murder charge conducted no inquiry even though the judge knew or should have known that Saunders' back-to-back representation of the murder victim and the accused would present a conflict. As a general rule, to establish ineffective assistance of counsel, a petitioner must show (1) objectively unreasonable performance and (2) prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A different test applies when there is a conflict of interest claim: "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348, 100 S.Ct. 1708. As we have said, "[w]hen counsel for a defendant in a criminal case has an actual conflict of interest ... and the conflict adversely affects counsel's performance in the defense of the defendant, prejudice to the defense is presumed and a new trial must be ordered." *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir.1991) (citing *Sullivan*, 446 U.S. at 348- 50, 100 S.Ct. 1708).

[14] There is a circumstance where a showing of adverse effect is not required, according to *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). We have described that circumstance as follows: "In *Wood v. Georgia*, the Court flatly stated that a *conflict situation* which is not addressed by the trial court requires reversal ... 'when the trial court has failed to make an inquiry even though it knows or reasonably should know that a particular conflict exists.' " *Tatum*, 943 F.2d at 379 (emphasis added, internal citation omitted) (quoting *Wood*, 450 U.S. at 272 n. 18, 101 S.Ct. 1097 (internal quotation marks omitted)). The Supreme Court decided *Wood* on conflict of interest



grounds even though neither party had raised the conflict issue. *See Wood*, 450 U.S. at 265 n. 4, 101 S.Ct. 1097. The Court concluded that "the record ... demonstrate[d] that the *possibility* of a conflict of interest was sufficiently apparent at the time of the [probation] revocation hearing to impose upon the [state] court a duty to inquire further." *Id.* at 272, 101 S.Ct. 1097. However, the Supreme Court could not "determine whether an actual conflict of interest was present, especially without the benefit of briefing and argument." *Id.* Accordingly, the Court ordered that the case be returned to the state trial court for "a hearing to determine whether the conflict of interest that th[e] record strongly suggest [ed] actually existed at the time of the probation revocation or earlier." *Id.* at 273, 101 S.Ct. 1097. Significantly, the *Wood* Court only asked the state court to determine whether there was an actual conflict; it did not require an additional finding of adverse effect. The Supreme Court specifically instructed the state court that if it found "an actual conflict of ***211** interest" and "no valid waiver of the right to independent counsel," "it must hold a new ... hearing that is untainted by a legal representative serving conflicting interests." *Id.* at 273-74, 101 S.Ct. 1097. Accordingly, to prevail under *Wood* a petitioner must establish that (1) the trial court failed to inquire even though it knew or reasonably should have known about an apparent conflict, *see id.* at 272, 101 S.Ct. 1097; *Tatum*, 943 F.2d at 379, (2) there "was no valid waiver of the right to independent counsel," *Wood*, 450 U.S. at 274, 101 S.Ct. 1097, and (3) counsel had "an actual conflict of interest," *id.* at 273, 101 S.Ct. 1097. Under *Wood* once a petitioner makes this showing, prejudice is presumed, and the petitioner is entitled to a new trial with conflict-free counsel. *See id.* at 273-74, 101 S.Ct. 1097.

[15][16] *Wood* places a special responsibility on trial courts to police situations that present apparent conflicts. As we have said, "[w]hen the risk of a conflict of interest is brought to the attention of the trial court ... the court has the responsibility to investigate further, to advise the defendant personally, and to receive a knowing waiver if that is the expressed wish of the defendant." *Tatum*, 943 F.2d at 379. If a court fails to initiate an inquiry when it knew or reasonably should have known of an apparent conflict, it has not carried out its responsibility. Careful attention to conflicts is essential to protecting a defendant's Sixth Amendment right to counsel: " 'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.... The trial court should protect the right of an accused to have the assistance of counsel.' " *Holloway v. Arkansas*, 435 U.S. 475, 484, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (quoting *Glasser v. United States*, 315 U.S. 60, 71, 62 S.Ct. 457, 86 L.Ed. 680 (1942)), *quoted in Tatum*, 943 F.2d at 379. This includes protecting the defendant's right to a lawyer who is free of conflicts. A trial judge's immediate attention to obvious conflicts is also important to maintain the integrity of, and public respect for, the justice system. *See Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) (noting that "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them"). *Wood* supports these principles by encouraging (in a practical way) trial judges to deal promptly with apparent conflicts: the case dispenses with the requirement to show adverse effect when a judge should have inquired, yet failed to do so, thus making it somewhat easier to obtain a new trial. [FN1]

FN1. Despite the dissent's suggestion, *see post* at 219, we do not

read *Wood* as overruling *Sullivan* by implication when we point out that *Wood* does not require a defendant to show adverse effect if the trial judge has failed to inquire into an apparent conflict. Because *Sullivan* and *Wood* addressed circumstances that are quite different, the two cases are easily harmonized. In *Sullivan* the trial judge had no duty to inquire because the defendant did not object to multiple representation and there was simply "the mere possibility of a conflict." *Sullivan,* 446 U.S. at 345, 347, 100 S.Ct. 1708. In this context, when the trial court has no duty of inquiry, the Supreme Court requires a defendant to "demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan,* 446 U.S. at 348, 100 S.Ct. 1708. *Sullivan,* however, was careful to point out that a trial court must "initiate an inquiry" when it "knows or reasonably should know that a particular conflict exists." *Id.* at 347, 100 S.Ct. 1708. But *Sullivan* did not articulate the defendant's burden when the trial court fails to fulfill a clear duty to inquire. That was left open for *Wood.* In *Wood* the record reflected much more than the "mere possibility" of a conflict. Rather, the state trial judge was faced with an apparent conflict--one that was clearly suggested by the circumstances. Because there was an apparent conflict, *Wood* held that the trial judge had a constitutional duty to inquire. *See Wood,* 450 U.S. at 272, 101 S.Ct. 1097. The failure to fulfill this duty carries a definite consequence, as the Court's remand order establishes: [The state] court should hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier. If the court finds that an actual conflict of interest existed at that time, and that there was no valid waiver of the right to independent counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests.

*Id.* at 273-74, 101 S.Ct. 1097. This is not "shorthand for [*Sullivan* ' s] two-part test," *see post* at 220; rather, the requirement for showing adverse effect is clearly omitted.

Our circuit opinions do not prevent us from applying *Wood* in Mickens' case, where the state judge was confronted with an apparent conflict.

In the Fourth Circuit cases mentioned by the dissent (*Gilliam, Beaver,* and *Tatum* ), *see post* at 220-22, we did not conclude that the trial judge had a constitutional duty to inquire. As a result, it was proper to apply *Sullivan* and not *Wood.*

***212** [17][18][19] Mickens meets the *Wood* test. First, the district court concluded that Judge Foster "knew, or should have know[n]" of the "apparent possible conflict." *Mickens,* 74 F.Supp.2d at 613-15. On April 3, 1992, Judge Foster dismissed the charges against Timothy Hall due to his death by making a handwritten order on his individual docket sheet. That single-paged docket sheet identified Saunders as Hall's lawyer. "[T]he next business day, Judge Foster appointed Saunders to represent Mickens in the capital murder of Hall." *Id.* at 614. In addition to these circumstances, "[t]he heinous nature of the crime and the publicity it received make it difficult to accept that the connection would have escaped Judge Foster's notice." *Id.* And, "the judge was no doubt aware that Mickens faced charges as to which it might be necessary to counter 'evidence about the victim and about the impact of the murder on the victim's family,' at least at the penalty phase of the case." *Id.* (quoting *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)). These facts and circumstances are sufficient to show that Judge Foster knew or should have known of the apparent conflict. [FN2] Mickens also did not waive his right to conflict-free counsel. Since he was never informed of the conflict of interest, he had no opportunity to either consider the conflict or to knowingly and intelligently waive his rights. As we discuss next, Mickens establishes an actual conflict of interest. [FN3]

FN2. The district court concluded that JDR Judge Foster, who handled Mickens' preliminary hearing, "was not relieved of her duty to inquire" into the conflict situation simply because "the trial was to be conducted in another court." *Mickens,* 74 F.Supp.2d at 615. The district court was correct. The right to conflict-free counsel arises at the beginning of a case. *See Holloway,* 435 U.S. at 489-90, 98 S.Ct. 1173 (discussing the importance of conflict-free counsel at the pretrial stage).

FN3. Mickens also argues that he is entitled to a new trial even without showing an actual conflict. Relief is required, he says, simply because the state judge neglected her duty to inquire into a potential conflict of interest. He thus seeks relief under what is sometimes called the "automatic reversal rule," which is based on a sentence from *Wood:* "*Sullivan* mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' " *Wood,* 450 U.S. at 272 n. 18, 101 S.Ct. 1097 (quoting *Sullivan,* 446 U.S. at 347, 100 S.Ct. 1708). At least one circuit (the Second) applies the automatic reversal rule when a judge who knew or should have known of a possible conflict failed to make an inquiry. *See Ciak v. United States,* 59 F.3d 296, 298, 307 (2d Cir.1995) (holding that automatic reversal rule applies to federal habeas cases); *United States v. Levy,* 25 F.3d 146, 153 (2d Cir.1994) (stating automatic reversal rule as follows: "When a possible conflict has been entirely ignored, reversal is automatic."). Because, as we will explain, Mickens has shown an actual conflict, we do not decide whether the "automatic reversal rule" should be adopted in this circuit. The dissent suggests that our application of *Wood* "is functionally equivalent to the automatic reversal rule." *Post* at 222. It is not. We are applying *Wood* in a straightforward way: when the trial court fails to carry out its constitutional duty to inquire into an apparent conflict, the defendant is

entitled to a new trial if his counsel labored under an actual conflict. On the other hand, under the automatic reversal rule the defendant gets a new trial when the trial court fails to inquire into "even the possibility" of a conflict. *Levy*, 25 F.3d at 153. In practice, possible conflicts do not always turn out to be actual conflicts. There is a real difference between the automatic reversal rule and our straight application of *Wood*.

***213** We begin our analysis of the actual conflict issue by considering Mickens' challenge to the test used by the district court. The district court used a modified version of a test for actual conflict developed by the Eleventh Circuit in *Freund v. Butterworth*, 165 F.3d 839 (11th Cir.) (en banc), *cert. denied*, 528 U.S. 817, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999). *Freund* distinguishes between cases of successive representation (such as Mickens') and cases of simultaneous or multiple representation. The *Freund* decision requires the petitioner to satisfy a tougher test in a successive representation case: such a petitioner "must show that either (1) counsel's earlier representation ... was substantially and particularly related to counsel's later representation of petitioner, or (2) counsel actually learned particular confidential information during the prior representation ... that was relevant to petitioner's later case." *Freund*, 165 F.3d at 859 (internal quotation marks, emphasis, and alterations omitted). Moreover, proof of either of these elements may not be enough, and the petitioner may be called upon to introduce "other proof of inconsistent interests." *Id.* (internal quotation marks omitted). Recognizing that neither the Supreme Court nor we have ever restricted proof of a conflict to the "two [*Freund* ] scenarios," the district court did modify the test to allow Mickens to meet his burden "through other proof of inconsistent interests ... if the interests actually diverged." *Mickens*, 74 F.Supp.2d at 603 (internal quotation marks omitted).

[20] Even though the district court's modification arguably broadens the *Freund* test, we decline to adopt that test, even as modified. Neither the Supreme Court nor this court has ever held that a stricter test should apply to a case of successive representation. In our most recent opinion involving successive representation, *Burket v. Angelone*, 208 F.3d 172 (4th Cir.), *cert. denied*, --- U.S. ----, 120 S.Ct. 2761, 147 L.Ed.2d 1022 (2000), we neither mentioned *Freund* nor indicated that successive representation cases should be treated any differently than cases of multiple representation. Instead, *Burket* reaffirmed that a variety of conflicting interests may infect a lawyer's representation:

> Counsel's "representation of conflicting interests, however, is not always as apparent as when he formally represents two parties who have hostile interests. He may harbor substantial personal interests which conflict with the clear objective of his representation of the client, or his continuing duty to former clients may interfere with his consideration of all facts and options for his current client."

*Burket*, 208 F.3d at 185 (quoting *Tatum*, 943 F.2d at 376). To determine whether *Sullivan* 's "actual conflict" requirement is met, we have formulated the following test: "To establish an actual conflict of interest, the petitioner must show that his interests 'diverge[d] with respect to a material factual or legal issue or to a course of action.' " *Williams*, 146 F.3d at 212 (quoting *Sullivan*, 446 U.S. at 356 n. 3, 100 S.Ct. 1708 (Marshall, J., concurring in part and dissenting in part)). *See also Gilbert v. Moore*, 134 F.3d 642, 652 (4th Cir.) (stating same test), *cert. denied*, 525 U.S. 840, 119 S.Ct. 103, 142 L.Ed.2d 82 (1998). We adhere to our existing test.



[21][22] Mickens contends that Saunders labored under one or more actual conflicts of interest. Mickens begins by arguing that his interests diverged from Saunders' because Saunders had a significant personal stake in not revealing his prior representation of Hall. The district court rejected this claim on the basis of Saunders' statements that he saw no conflict of interest and that as far as he was concerned his representation of Hall "[e]nded when I walked into the courtroom and they told me he was dead and the case was gone." We conclude that the district court erred. To begin with, the district court decided to put great weight on Saunders' ***214** testimony based on our observation in *United States v. Young*, 644 F.2d 1008 (4th Cir.1981), that a court "accords great weight to a lawyer's perception of a conflict" when evaluating a conflicts claim. 644 F.2d at 1014. However, the district court did not consider our next crucial statement that "courts necessarily rely in large measure upon the good faith and good judgment of defense counsel in determining whether an actual conflict of interest exists." *Id.* (internal quotation marks omitted). The difficulty with placing "great weight" on Saunders' testimony that he did not see a conflict is that the district court repeatedly found that Saunders did not exercise good judgment. *See, e.g., Mickens*, 74 F.Supp.2d at 605 (noting that Saunders' view that he had no continuing allegiance to Hall was "remarkably wrong"); *id.* at 606 (noting that Saunders' failure to disclose his prior representation of Hall was "inexcusable"); *id.* at 612 n. 20 (finding that Saunders' testimony that "he assumed that [his co-counsel] (and everyone else) knew that he had represented Hall ... lacks evidentiary support and ... borders on the absurd"); *id.* at 612 (finding that Saunders had a "myopic view of the potential conflicts and [an] utter insensitivity to the ethical issues raised by the facts"); *id.* at 605 (stating that "the evidence shows that, regrettably, Saunders never struggled with the ethical issues"); *id.* at 611 (concluding that Saunders' reasons for failing to pursue investigative leads "are not defensible"). In situations such as this where a lawyer fails to exercise good judgment, courts do not hesitate to disregard a lawyer's testimony that he did not perceive a conflict of interest. *See United States v. Swartz*, 975 F.2d 1042, 1046-48 (4th Cir.1992) (rejecting lawyer's statement that he had "[n]o conflict whatsoever" in representing two defendants in same case); *Hoffman v. Leeke*, 903 F.2d 280, 286 (4th Cir.1990) (rejecting lawyer's testimony that "he saw no conflict of interest because he thought [his two clients in the same criminal case] would testify to substantially the same facts"); *cf. Wheat*, 486 U.S. at 163, 108 S.Ct. 1692 (holding that a court may disqualify a lawyer who is willing to accept a client's waiver of a conflict of interest and observing "that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information [about potential problems] to them"). Thus, *Young* does not establish a rule that courts must always accord great weight to a lawyer's perception about whether an actual conflict exists. Rather, when it is clear that the lawyer lacks good faith or good judgment, his testimony may be disregarded, or at least not be given "great weight." Here, we are not suggesting that Saunders' testimony should have been rejected, but it was certainly not entitled to great weight in light of the district court's several findings that confirmed Saunders' poor judgment.

In any event, because the district court took Saunders' testimony as truthful, so do we.

Still, his testimony--taken at whatever weight--does not undermine Mickens' argument that there was an actual conflict. As we have repeatedly recognized, a lawyer's personal interests may "conflict with the clear objective of his representation of the client." *Burket,* 208 F.3d at 185 (quoting *Tatum,* 943 F.2d at 376). *See also Fields,* 956 F.2d at 1298-99 (noting that petitioner arguably demonstrated a conflict when his interests diverged from his lawyer's "interest in protecting his own professional reputation and good-standing"); *United States v. Magini,* 973 F.2d 261, 264 (4th Cir.1992). When Saunders undertook the representation of Mickens, it was clearly established that "[d]efense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises." *Sullivan,* 446 U.S. at 346, 100 S.Ct. 1708. *See also* Va.Code Prof'l Responsibility DR5-105(A) (Michie 1992). And, the Virginia Code of Professional Responsibility (as it was called at the time of Mickens' trial) provided that a lawyer had ***215** the duty to "explain any circumstances that might cause a client to question his undivided loyalty." Va.Code Prof'l Responsibility EC 5-19 (Michie 1992). As the district court found, "Saunders' representation of the murder victim, at the time of the murder, is undoubtedly a circumstance 'that might cause a client to question his undivided loyalty.' " *Mickens,* 74 F.Supp.2d at 601. Regardless of whether Saunders believed he could ethically represent Mickens, he was also required to "defer to a client who [held] the contrary belief [by] withdraw [ing] from representation of that client." Va.Code Prof'l Responsibility EC 5-19 (Michie 1992). Saunders thus had the duty to inform both Mickens and the court of the prior representation of Hall. If Mickens had objected, Saunders had a related duty to withdraw.

Once Saunders proceeded with the representation of Mickens in these circumstances, he was potentially subject to disciplinary proceedings, which gave rise to an interest in protecting his professional reputation. In other words, Saunders had an interest in preventing his representation of Hall from coming to light. This interest diverged from Mickens' interest in learning about the earlier representation and in making sure he (Mickens) received conflict-free representation. Saunders was thus caught in an actual conflict. *See Fields,* 956 F.2d at 1298-99 (recognizing potential conflict when client's interest required lawyer "to confess his own negligence or incompetence," but ultimately rejecting claim because once lawyer "frankly admitted [his errors] in open court," "any conflict that might have stemmed from [the lawyer's] interest in protecting his professional standing evaporated"); *cf. United States v. Iorizzo,* 786 F.2d 52, 58 (2d Cir.1986) (holding that defendant established conflict of interest claim when lawyer, "solely to protect" his own interest in his professional reputation, decided to forego cross-examination of witness that lawyer had previously represented); *Government of the Virgin Islands v. Zepp,* 748 F.2d 125, 136 (3d Cir.1984) (holding that an actual conflict existed when defendant's interests diverged from trial counsel's personal interest in avoiding potential criminal and disciplinary charges for destroying evidence in defendant's case). Saunders' testimony that he did not perceive a conflict may speak to whether the conflict caused an adverse effect, but it does not negate the reality of an actual conflict.

Mickens next contends that an actual conflict existed because Saunders could not investigate Hall, using the confidential information he learned from the young man, without violating the ethical duties that he (Saunders) owed to Hall, his former client.



Saunders had a duty to preserve Hall's secrets and confidences even though his employment as Hall's lawyer had ended. *See* Va.Code Prof'l Responsibility DR 4-101, EC 4-6 (Michie 1992). The Supreme Court has recently reaffirmed the common law rule that a lawyer's duty to protect his client's confidences continues after the client's death. *See Swidler & Berlin v. United States,* 524 U.S. 399, 410-11, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998). Saunders also had a duty to zealously represent Mickens. *See* Va.Code Prof'l Responsibility DR 7-101 (Michie 1992). In representing Mickens, Saunders could not pull his punches in order to protect what he knew about Hall.

[23][24] The district court applied the *Freund* test to reject Mickens' conflicts claim on the ground that "Saunders did not learn any confidential information from Hall that was relevant to Mickens' defense either on the merits or at sentencing." *Mickens,* 74 F.Supp.2d at 606 (emphasis omitted). The district court erred as a matter of law because it focused too narrowly in describing the circumstance (defense on the merits or at sentencing) where confidential information might be relevant or useful. We have held that an actual conflict can also arise at the investigation and plea negotiation stages of a representation. *See Burket,* 208 F.3d at ***216** 185 (" '[A] failure to act on behalf of a client before trial has representational significance.' " (quoting *Tatum,* 943 F.2d at 376)); *Magini,* 973 F.2d at 263 ("A conflict which causes counsel to fail to explore possible plea negotiations may implicate the Sixth Amendment right to counsel."). The proper inquiry, therefore, is whether Saunders' interest (or duty) in maintaining Hall's secrets and confidences diverged from Mickens' interest in pursuing a course of action, specifically, a reasonable pretrial investigation. *See Williams,* 146 F.3d at 212. Here, the divergence of interests was sufficient to create a second actual conflict.

The district court found that Saunders learned the following information through his representation of Hall: "(a) Hall had been charged with carrying a concealed weapon at the intersection of 27th Street and Marshall in Newport News; (b) Hall's mother had pressed charges against him for assault ...; and (c) Hall was not living with his mother at the time of his death." *Mickens,* 74 F.Supp.2d at 606. The district court also found that Saunders met with Hall for fifteen to thirty minutes and that they discussed "the circumstances surrounding each of the charged crimes." *Id.* at 599. Finally, the district court acknowledged that Saunders obtained confidential information from Hall. *Id.* at 606. Saunders thus learned "confidences" and "secrets" in his representation of Hall that he (Saunders) was bound not to reveal. *See* Va.Code Prof'l Responsibility DR 4-101 (Michie 1992); *Commonwealth v. Edwards,* 235 Va. 499, 370 S.E.2d 296, 301 (1988). Moreover, under Virginia law even the charges against Hall were confidential because they were in Hall's juvenile court records which cannot be opened to those outside the juvenile court system without a court order. *See* Va. Stat. Ann. § 16.1-305.

Juxtaposed to Saunders' duty to remain loyal to Hall by maintaining his confidences and secrets was a duty he owed to his new client, Mickens. As illustrated by the American Bar Association's standards, Saunders had the duty to conduct a thorough pretrial investigation for Mickens: "Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *ABA Standards for Criminal Justice* Standard 4-4.1(a) (3d ed.1993). The Supreme Court and our circuit have recognized the ABA standards as "guides to determining what is reasonable." *Strickland,* 466 U.S. at 688, 104

S.Ct. 2052, *quoted in Jones v. Murray*, 947 F.2d 1106, 1110 (4th Cir.1991). Saunders did not investigate (or attempt to develop) any negative information about Hall, the victim of the crime Mickens allegedly committed. Yet the circumstances of this crime (murder and sodomy) suggested that some consideration had to be given to investigating the character and background of the victim. There were no witnesses to Hall's murder, which occurred in a secluded area that was a "known gathering place for homosexuals," *Mickens*, 74 F.Supp.2d at 607. Saunders knew from his representation of Hall that Hall had some tendency to violence or aggressiveness and that for some reason he was no longer living at home, despite his young age. This information, together with the notable location of Hall's murder, at least suggested an investigation into whether consent to the sodomy and self-defense to the murder might be defenses or statutory mitigators. In other words, the negative information Saunders had about Hall had the potential to lead to information about the circumstances of the crime. Indeed, the district court recognized that "a reasonable investigation would have included an examination of Hall's past." *Id.* at 610. Nevertheless, the district court did not see a problem. The court concluded that the confidential information Saunders had about Hall did not create an actual conflict because it "was irrelevant to Mickens' defense" since he denied committing the crime. *Id.* at 606. This analysis misses ***217** the mark because a lawyer has an initial duty to investigate and to make his own, independent appraisal of the case. *See ABA Standards for Criminal Justice* Standard 4-4.1(a). Of course, obvious avenues of investigation do not always lead to relevant evidence or viable defenses. The point is that reasonable areas of investigation must be considered and pursued. Because of Saunders' duty to protect Hall's secrets and confidences, he could not even *consider* an investigation that was suggested by the circumstances. *See Tatum*, 943 F.2d at 376 (noting that actual conflict exists when lawyer's "continuing duty to former client[ ] ... interfere[s] with his *consideration* of all facts and options for his current client") (emphasis added). We recognize that in its adverse effect inquiry the district court "credit[ed] Saunders' testimony that he did not refrain from taking any actions for Mickens because of his earlier representation of Hall." *Mickens*, 74 F.Supp.2d at 612. But that begs the question whether Saunders had an actual conflict in the first place. Saunders' testimony that there was no adverse effect does not address whether Mickens' interests diverged from Saunders' interests in protecting Hall's confidences. Saunders had an actual conflict because he could not even consider an investigation into Hall's character or background, using as a starting point the information he had about the circumstances of the crimes charged against Hall.

Saunders' duty to conduct a reasonable investigation created still another conflicting interest. Because this was a capital case, there was a good chance that someone from the victim's family (perhaps Hall's mother) would testify during the penalty phase. *See* Va. Stat. Ann. § 19.2-264.4 (Michie 1992); *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); *Mickens*, 74 F.Supp.2d at 614. Again, there is a duty to "explore all avenues leading to facts relevant to ... the penalty." *ABA Standards for Criminal Justice* Standard 4-4.1(a). Surely this would require defense counsel to consider investigating the victim's relationship with key family members, especially (in this case) the victim's mother since the victim was a juvenile. Here, Saunders, while he represented Hall, learned something about his relationship with his mother and about the fact that he no longer lived at home. In particular, Saunders learned about the circumstances leading to the charge that Hall had "grabbed [his mother] by the arms and shoved her to the ground" shortly before his death. *Mickens*, 74 F.Supp.2d at 599. This confidential or secret information that Saunders had about some aspects of Hall's relationship with his mother also created a conflict: Saunders' interest in preserving Hall's confidences diverged from Mickens' interest in having Saunders consider an investigation into Hall's relationship with his mother.

In sum, Mickens must be afforded a new trial because of the conflict of interest problem. He has shown that (1) the state judge failed to inquire into an apparent conflict that she knew or reasonably should have known existed, (2) he did not waive any conflict, and (3) his lawyer, Saunders, had an actual conflict of interest. This is sufficient under *Wood v. Georgia* to establish the merits of his claim that he was deprived of his Sixth Amendment right to representation that is free of conflicts of interest. Prejudice is therefore presumed, and Mickens is entitled to a new trial. [FN4]

> FN4. Mickens also argues that he is entitled to relief under a straightforward application of the *Sullivan* test, that is, he has shown both actual conflict and adverse effect. Because the presence of an actual conflict is sufficient to presume prejudice in the circumstances of this case, we need not consider the question of adverse effect.

III.

[25] Mickens next argues that the district court erred in rejecting his claims for ineffective assistance of counsel based on his trial counsels' inadequate pretrial investigation ***218** and failure to request a psychiatric evaluation for the resentencing. The first of these claims is that counsel were ineffective because they failed to investigate (or to request an investigator) for the purpose of gathering evidence for a consent defense and for use in mitigation at sentencing. The district court held that Mickens' claims of inadequate investigation were defaulted because he had not fairly presented them to the Virginia courts. *See Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997). We agree with the district court. *See Mickens*, 74 F.Supp.2d at 598.

[26] Mickens' second ineffective assistance claim focuses on counsels' failure to obtain a mental health expert to perform an evaluation for the resentencing. The district court rejected this argument on the merits. On appeal Mickens has not shown us what a mental health expert would have discovered beyond what counsel already knew at the time of the resentencing. Moreover, this claim was also adjudicated against Mickens on the merits in state court. *See Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1516, 146 L.Ed.2d 389 (2000) ("The relevant provision, 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III), prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." (quoting 28 U.S.C. § 2254(d)(1))). We also reject this claim.

IV.

Mickens argues that the evidence was insufficient to prove attempted forcible sodomy. He further contends that absent sufficient proof of the underlying predicate offense, the capital murder conviction cannot stand. The district court concluded that this

claim was defaulted because it was not fairly presented to the state courts. *See Matthews,* 105 F.3d at 911. Again, we agree with the district court. *See Mickens,* 74 F.Supp.2d at 597.

V.

[27] In his reply brief Mickens raises the argument that the ineffective assistance of his state habeas counsel excuses the default of additional ineffective assistance of counsel claims raised for the first time in his federal habeas petition. We have held that ineffective assistance by state habeas counsel fails to establish cause, *see Mackall v. Angelone,* 131 F.3d 442, 449 (4th Cir.1997) (en banc) ("Because [petitioner] has no right to effective assistance of counsel in his state habeas proceedings, he cannot demonstrate cause to excuse the procedural default of his claims that his trial and appellate counsel were constitutionally ineffective."), *cert. denied,* 522 U.S. 1100, 118 S.Ct. 907, 139 L.Ed.2d 922 (1998), and the district court held the additional claims defaulted on this ground. We adopt the district court's analysis on this issue. *See Mickens,* 74 F.Supp.2d at 595.

VI.

A certificate of appealability is issued. The judgment of the district court is reversed because Walter Mickens' lead trial counsel had a conflict of interest that the judge appointing counsel failed to look into. On remand the district court will grant the writ of habeas corpus unless the Commonwealth of Virginia retries Mickens within 180 days of the issuance of our mandate.

*REVERSED.*

WIDENER, Circuit Judge, dissenting:

I respectfully dissent. Because Mickens has failed to establish that his attorney's conflict of interest adversely affected his representation, I would affirm the decision of the district court and deny Mickens' petition for habeas corpus relief.

***219** I.

I accept, for the purposes of argument, the majority's conclusion that Mickens' attorney labored under an actual conflict of interest. I must disagree, however, with the majority's conclusion that the Supreme Court's decision in *Wood v. Georgia,* 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), relieves Mickens from his burden of establishing that his attorney's conflict of interest adversely affected his representation.

As the majority has noted, a criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel unhindered by conflicts of interest. *Wood,* 450 U.S. at 271, 101 S.Ct. 1097; *United States v. Tatum,* 943 F.2d 370, 375 (4th Cir.1991). The general standard for ineffective assistance of counsel has most clearly been articulated by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail, a petitioner alleging ineffective assistance of counsel must establish, (1) that his attorney's representation fell below an objectively reasonable performance and (2) that the inadequate performance prejudiced the petitioner's case. *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. This constitutional standard for establishing ineffective assistance of counsel applies equally in collateral habeas corpus proceedings as it does on direct appeal. *Strickland,* 466 U.S. at 697, 104 S.Ct. 2052.



Even as it clarified the applicable standard for ineffective assistance of counsel, however, the *Strickland* Court harmonized existing case law and noted exceptions to the new standard it articulated, recognizing special circumstances addressed by its prior decisions. The *Strickland* Court recognized that a claim of ineffective assistance of counsel predicated on a defense attorney's conflict of interest presents a special case. *Strickland,* 466 U.S. at 692, 104 S.Ct. 2052. To establish ineffective assistance of counsel predicated on a conflict of interest a defendant must establish only that (1) his attorney labored under an actual conflict of interest that (2) adversely affected the representation. See *Cuyler v. Sullivan,* 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). After a defendant satisfies this two-part test, prejudice is presumed and a defendant need not show that the conflict altered the outcome of the proceeding. *Sullivan,* 446 U.S. at 349-50, 100 S.Ct. 1708.

In *Wood,* the Court addressed a conflict of interest issue apparent on the face of the record even though the conflict had not been addressed below. *Wood,* 450 U.S. at 262-63, 101 S.Ct. 1097. Because the case arose as an appeal from a revocation of probation, the Court analyzed the conflict under due process, rather than Sixth Amendment grounds. *Wood,* 450 U.S. at 271-72, 101 S.Ct. 1097. Nonetheless, the Court cited *Sullivan* for the proposition that the Sixth Amendment ensures a right to counsel free from conflict of interest. *Wood,* 450 U.S. at 271, 101 S.Ct. 1097. Without the benefit of briefing, the Court could not determine whether counsel labored under an actual conflict of interest. *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. The record was adequate to establish, however, "that the possibility of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the [trial] court a duty to inquire further." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. The *Wood* Court thus clarified that trial courts have an obligation to inquire into potential conflicts of interest when they know or reasonably should know of a conflict.

The Supreme Court remanded the case and instructed the trial court "to determine whether the conflict of interest that this record strongly suggests actually existed" but did not expressly instruct the ***220** trial court to identify an adverse effect. *Wood,* 450 U.S. at 273, 101 S.Ct. 1097. The majority concludes that, because the *Wood* Court did not expressly require the trial court to identify an adverse effect on remand, a defendant need not establish an adverse effect when a trial court had a duty to inquire into a conflict of interest but fails to do so. Thus, the majority reads *Wood* to have overruled the second part of *Sullivan's* two-part standard by implication. "Overruling by implication is not favored." *Catawba Indian Tribe of South Carolina v. South Carolina,* 978 F.2d 1334, 1347 (4th Cir.1992).

At the risk of self-immolation, I should say that the decision in *Wood,* to me, has not turned out to be a model of clarity. The *Wood* Court was concerned about the potential conflict of interest faced by a defense attorney hired and compensated by the defendants' employer whose interests appeared to diverge from their own. *Wood,* 450 U.S. at 269-71, 101 S.Ct. 1097. The Court cited *Sullivan* for the proposition that a defendant's right to effective counsel includes a right to "representation that is free from conflicts of interest." *Wood,* 450 U.S. at 271, 101 S.Ct. 1097. The Court then noted that "[o]n the record before us, we cannot be sure whether counsel was *influenced in his basic strategic decisions* by the interests of the employer who hired him." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097 (emphasis added). If the defendants' attorney had been so influenced, the Court

ruled, "the due-process rights of petitioners were not respected." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. That language may only mean that the Court required not just an actual conflict, but also an indication that the conflict adversely affected the counsel's basic strategic decisions. When read in this light, the *Wood* Court's terse instruction to the trial court on remand does not bear the Constitutional weight the majority ascribes to it. As this court has recognized, the two requirements of the *Sullivan* test, "an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap." *United States v. Tatum* 943 F.2d 370, 375 (4th Cir.1991). Thus, the *Wood* Court's instruction to the trial court amounts to no more than shorthand for an explicit two part test that the *Wood* Court did not even have occasion to quote in its majority decision much less to overrule. Indeed, *subsequent to Wood,* found in 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220, the holding of *Sullivan* was underscored by its citation in *Strickland:* "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Strickland,* 466 U.S. at 692, 104 S.Ct. 2052 (quoting *Sullivan,* 446 U.S. at 348, 100 S.Ct. 1708).

Only in extraordinary circumstances not present here has the Supreme Court reversed a conviction because of an actual conflict of interest without a determination that the conflict of interest adversely affected the representation. The only occasions I have found in which the Supreme Court has not inquired into an adverse effect are those cases in which a defense attorney objected to the conflict of interest and the trial court nonetheless declined to address the conflict. In such a case, the Supreme Court has held, reversal is required without inquiry into either actual conflict or adverse effect. See *Holloway v. Arkansas,* 435 U.S. 475, 488-89, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

The majority decision is also contrary to this court's interpretation of *Wood.* In *United States v. Gilliam,* 975 F.2d 1050 (4th Cir.1992), this court addressed *Wood* without concluding, as does the majority here, that the Supreme Court had partially overruled *Sullivan.* In *Gilliam,* the defendant did not raise the issue of conflict resulting from multiple representation until he obtained new counsel at the sentencing phase of his trial and, as a result of his delay, the trial court declined to conduct a ***221** hearing into the possibility of conflict. *Gilliam,* 975 F.2d at 1054. On appeal, this court concluded that the defendant had alleged an actual conflict and noted that "if the court is aware, or should be aware, of a particular conflict, it should conduct a sua sponte inquiry into its existence." *Gilliam,* 975 F.2d at 1053 (quoting *United States v. Akinseye,* 802 F.2d 740, 744 (4th Cir.1986)). Without citing *Wood,* the court held that "failure of the court to make inquiry under Rule 44(c) is not, standing alone, sufficient to require reversal of a conviction" and remanded to the district court to conduct a hearing into the conflict. *Gilliam,* 975 F.2d at 1053-54. The court cited the *Sullivan* two-part test as the applicable standard. See *Gilliam,* 975 F.2d at 1054 n. 5. Rather than reverse, this court remanded, noting that "we do not mean to dictate the result to be reached by the lower court" on remand, and left open the possibility that the district court might deny the claim on the grounds that there was "no suggestion that the alleged conflict *impaired the ability of counsel* to present the case to the jury." *Gilliam,* 975 F.2d at 1054 (emphasis added).

Again, in *Beaver v. Thompson,* this court noted that "[t]o prevail on a claim of conflict of interest, Beaver must present convincing



evidence of an actual conflict and a resulting adverse effect on performance." 93 F.3d 1186, 1192 (4th Cir.1996). This court applied the two-part *Sullivan* test without citing *Wood* in a case where the defense attorney was a part-time prosecutor for the neighboring county and where the local trial court would presumably have been aware of the potential conflict.

The majority relies on language in *United States v. Tatum* that "[i]n *Wood v. Georgia,* the Court flatly stated that a conflict situation which is not addressed by the trial court requires reversal." *Tatum,* 943 F.2d at 379 (citations omitted). The *Tatum* court cited *Wood* in response to an argument, raised by the government and accepted by the district court, that the court's review of the conflict of interest issue was premature because facts of record had not yet been developed. *Tatum,* 943 F.2d at 379. The implication was that the defendant would be free to raise the issue on collateral habeas corpus review rather than on direct appeal. Nonetheless, the *Tatum* court cited the two-part test of *Sullivan* as the applicable standard. *Tatum,* 943 F.2d at 375. The court then applied the test concluding that "known facts lead inevitably to the conclusion that [defendant's counsel] had unacceptable conflicts of interest" and "that *pretrial strategies were adversely affected* by those conflicts." *Tatum,* 943 F.2d at 380 (emphasis added). The court concluded that when, as in the case before it, "the record supports these conclusions, we may confront the issue on direct appeal." *Tatum,* 943 F.2d at 380 (citing *Wood,* 450 U.S. at 272, 101 S.Ct. 1097). Thus, contrary to the majority's holding, *Tatum* expressly upheld and applied the *Sullivan* two-part test and cited *Wood* for the more narrow jurisdictional point that this court could appropriately address the conflict of interest issue on direct appeal.

II.

Mickens asserts that, when a trial court has failed to inquire into a potential conflict even though it knew or should have known of the conflict, footnote 18 of the *Wood* decision requires automatic reversal without any inquiry into the existence of either an actual conflict or an adverse effect. See, e.g., *United States v. Levy,* 25 F.3d 146, 153 (2nd Cir.1994); *Unites States v. Burney,* 756 F.2d 787, 791 (10th Cir.1985). The relevant footnote states that "*Sullivan* mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' " *Wood,* 450 U.S. at 273 n. 18, 101 S.Ct. 1097 (internal quote from *Sullivan,* 446 U.S. at 347, 100 S.Ct. 1708).

***222** The majority declines to reach Mickens' argument about footnote 18 because it concludes he has identified an actual conflict and that the *Wood* Court's instruction to the trial court on remand eliminates the requirement of an adverse effect. See Majority opinion at 212 n. 3. On its face, the majority's rule is distinct from the automatic reversal rule in that it requires a reviewing court to find that an actual conflict of interest existed before it may reverse a conviction. See Majority opinion at 210-11. In practice, however, the rule adopted by the majority, which eliminates the adverse effect requirement when a trial court fails to inquire into a conflict about which it should have known, is functionally equivalent to the automatic reversal rule.

In the absence of an objection from defense counsel, the trial court need not conduct an inquiry unless it "knows or reasonably should know that a *particular* conflict exists." *Sullivan,* 446 U.S. at 347, 100 S.Ct. 1708 (emphasis added). In most cases, the same facts that would lead an appellate court applying Mickens' automatic reversal rule to

conclude that the trial court should have been aware of a "particular conflict" would also lead a court applying the majority's rule to conclude that an actual conflict existed. Under either rule, the result is reversal of the defendant's conviction. In this case, for example, the majority finds that the trial court should have been aware of the conflict because Mickens faced charges which might require his defense counsel to counter evidence about the victim and the impact of the murder on the victim's family. See majority opinion at 212. By the same token, the majority finds an actual conflict because Mickens' counsel was obligated to investigate and to consider using evidence about the victim to challenge the nature of the crime and the impact of the murder on the victim's family. See majority opinion at 216-17.

For the same reasons that I reject the majority's proposed rule, which requires automatic reversal in practice, I must reject the rule asserted by Mickens, which requires automatic reversal on its face. Despite Mickens' assertions, footnote 18 of *Wood* can not mean that automatic reversal is required when a trial court fails to inquire into a conflict about which it knew or should have known. That rule would be inconsistent with the manner in which the *Wood* Court disposed of the case before it. In *Wood*, the Court ruled that the "possibility of a conflict of interest was sufficiently apparent ... to impose upon the [trial] court a duty to inquire further" and noted that the trial court had failed to conduct such an inquiry. *Wood*, 450 U.S. at 272, 101 S.Ct. 1097. These holdings satisfy the predicates necessary to trigger the automatic reversal rule asserted by Mickens. Nonetheless, the *Wood* Court chose to remand the case before it to the trial court for an inquiry into the conflict rather than to reverse the trial court's decision. *Wood*, 450 U.S. at 273, 101 S.Ct. 1097.

I should add that the footnote language upon which Mickens relies should be considered as a response by the *Wood* majority to Justice White's dissent, not an attempt to create a new rule requiring automatic reversal. Justice White argued that the Court did not have jurisdiction to address the conflict of interest apparent from the record because the conflict had not been raised in the courts below. *Wood*, 450 U.S. at 280, 101 S.Ct. 1097. In response, the *Wood* Court's footnote 18 defended its jurisdiction by indicating that the trial court's failure to conduct an inquiry constituted error under the rule of *Sullivan* and noting that *Sullivan* did not prohibit "the raising of a conflict-of-interest problem that is apparent in the record." *Wood*, 450 U.S. at 273 n. 18, 101 S.Ct. 1097 (quoting *Sullivan*, 446 U.S. at 347, 100 S.Ct. 1708). Subsequent decisions have cited *Wood* for this procedural point. See *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33, 114 S.Ct. 425, 126 L.Ed.2d 396 (1993); *Tatum*, 943 F.2d at 380.

***223** III.

Because I disagree with the majority's conclusion that *Wood* has eliminated the requirement that an actual conflict adversely affect the representation and reject Mickens invitation to adopt the automatic reversal rule, I should address briefly whether Mickens has established an adverse effect in this case.

I note, especially, that the majority decision does not take issue with the finding of the district court that Saunders' conflict of interest caused no adverse effect in the representation of Mickens in this case. A reference to the reported opinion of the district court is instructive. Commencing at 74 F.Supp.2d, page 606, and continuing to page 613, the district court considered each of Mickens' claims of adverse effect:



Saunders' failure to raise a consent defense; failure to investigate or raise any negative information about Hall; failure to engage in meaningful plea negotiations; failure to appraise the sentencing court of Hall's pending charges or strained relationship with his mother; failure to pass along information to his co- counsel; and making a deficient investigation. The district court considered each of these items in great detail, and supported its findings with page and exhibit references from the record. Its findings are largely factual, and the majority does not contend they are clearly erroneous.

The majority correctly states that the existence of a conflict presents a mixed question of law and fact subject to de novo review, *Sullivan*, 446 U.S. at 342, 100 S.Ct. 1708, and that the district court's factual findings are subject to the clearly erroneous standard. *Fields v. Attorney General*, 956 F.2d 1290, 1297 n. 18 (4th Cir.1992). However, the adverse effect inquiry, in my view, is so heavily fact dependent that I believe considerable deference must be given to the findings of the district court.

A defendant has established an adverse effect if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another. See *Tatum*, 943 F.2d at 376. Thus both taking affirmative actions and failing to take actions "that are clearly suggested by the circumstances" can indicate an adverse effect. *Tatum*, 943 F.2d at 376. Based on our holding in *Tatum*, I agree with the district court's thoughtful articulation of a three-part standard for showing an adverse effect which, as in any other civil action, Mickens must establish by a preponderance of the evidence. *Mickens*, 74 F.Supp.2d at 603-04 (citing *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir.1999) (en banc)). First, the defendant must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second the defendant must show that the alternative strategy or tactic was objectively reasonable under the facts of the case. Because prejudice is presumed, the petitioner need not show that the tactic or strategy would have altered the outcome of the trial, rather he must only establish that the alternative "possessed sufficient substance to be a viable alternative." *Freund*, 165 F.3d at 860. Finally, the defendant must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.

Mickens challenges this standard, arguing that neither this circuit nor the Supreme Court has required a petitioner to establish a link between an adverse effect and an actual conflict. Such a link is implicit, however, in the Supreme Court's requirement that a defendant show that "his counsel actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348, 350, 100 S.Ct. 1708. As this court has noted, the two requirements, "an actual conflict of interest *resulting in an adverse effect* on counsel's performance, are often intertwined, making the factual analyses of them overlap." *Tatum*, 943 F.2d at 375 (emphasis added).

I conclude that the district court applied the appropriate standard to evaluate the ***224** adverse effects asserted by Mickens. Because I agree with the district court that many of Mickens' assertions of adverse effect were not viable defense strategies and that those that were viable defense strategies were not linked to his attorney's conflict of interest, I agree that there was no adverse effect from Saunders' conflict of interest.

IV.

To sum up the case, the rule of *Cuyler v. Sullivan* is that in order to prevail in a case such as this "... a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 350, 100 S.Ct. 1708. That rule was endorsed by the Court explicitly in *Strickland v. Washington*, 466 U.S. at 692, 104 S.Ct. 2052: "Prejudice is presumed only if the defendant demonstrates that ... 'an actual conflict of interest adversely affected his lawyer's performance.' " *Sullivan* was decided in 1980, and *Strickland* in 1984. The majority holds that the intervening 1981 case of *Wood v. Georgia* has changed that rule so that an adverse effect is no longer required. I am of opinion that *Wood* did not change the *Sullivan* rule and, for that reason, I respectfully dissent.

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74 F.Supp.2d 586
**(Cite as: 74 F.Supp.2d 586)**

**Walter MICKENS, Jr., Petitioner,**
**v.**
**Fred W. GREENE, Warden, Respondent.**

**No. Civ.A. 3:98cv102.**

United States District Court,
E.D. Virginia,
Richmond Division.

Nov. 5, 1999.

Following affirmance, 252 Va. 315, 478 S.E.2d 302, of conviction of capital murder and sentence of death, petitioner sought writ of habeas corpus. The District Court, Payne, J., held that: (1) several of petitioner's claims were procedurally defaulted; (2) evidence supported conviction; (3) petitioner was not denied effective assistance of counsel with respect to pretrial investigation or lack of psychiatric evaluation for sentencing; and (4) trial counsel's potential conflict of interest did not warrant reversal of conviction.

Petition denied.

**[1] HABEAS CORPUS k319.1**

197k319.1
A state prisoner must exhaust all available state remedies before he can apply for federal habeas relief.

**[2] HABEAS CORPUS k363**
197k363
To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court; fair presentation contemplates that both the operative facts and the controlling legal principles must be presented to the state court.

**[2] HABEAS CORPUS k380.1**
197k380.1
To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court; fair presentation contemplates that both the operative facts and the controlling legal principles must be presented to the state court.

**[2] HABEAS CORPUS k382**
197k382
To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court; fair presentation contemplates that both the operative facts and the controlling legal principles must be presented to the state court.

**[3] HABEAS CORPUS k382**
197k382
Before bringing federal habeas petition, the petitioner is obligated, in state court, to identify the federal constitutional right purportedly infringed, identify the facts thought to support such a violation, and to explain how those facts establish a violation of his constitutional rights.

**[3] HABEAS CORPUS k383**
197k383
Before bringing federal habeas petition, the petitioner is obligated, in state court, to identify the federal constitutional right purportedly infringed, identify the facts thought to support such a violation, and to explain how those facts establish a violation of his constitutional rights.

**[4] HABEAS CORPUS k382**
197k382
The exhaustion requirement is not satisfied if the petitioner presents new legal theories or

factual claims for the first time in his federal habeas petition.

**[5] HABEAS CORPUS k422**
197k422
If a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the petitioner has procedurally defaulted his federal habeas claim in federal court.

**[6] HABEAS CORPUS k314**
197k314
A procedural default occurs when a federal habeas petitioner has failed to exhaust available state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.

**[7] HABEAS CORPUS k401**
197k401
Absent a showing of cause and prejudice or a fundamental miscarriage of justice, a federal habeas court is precluded from reviewing the merits of a defaulted claim.

**[7] HABEAS CORPUS k404**
197k404
Absent a showing of cause and prejudice or a fundamental miscarriage of justice, a federal habeas court is precluded from reviewing the merits of a defaulted claim.

**[8] HABEAS CORPUS k405.1**
197k405.1
To demonstrate "cause" which will excuse the default of claims, habeas petitioner must establish that some objective factor external to the defense impeded counsel's efforts to raise the claim in state court at the appropriate time.

**[9] HABEAS CORPUS k406**
197k406
Ineffective assistance of counsel may constitute "cause" for a procedural default under certain circumstances.

**[10] HABEAS CORPUS k406**
197k406
Alleged ineffective assistance of state habeas counsel did not excuse federal habeas petitioner's default of certain claims, despite petitioner's allegation that limitations on his literacy capacity precluded participation in state habeas proceedings; petitioner had no constitutional right to effective assistance of counsel in state habeas proceeding, and petitioner's notarized signature, attached to state habeas petition, reflected that petitioner had read petition and that petition had been read to him. U.S.C.A. Const.Amend. 6.

**[11] HABEAS CORPUS k406**
197k406
For an error of counsel to constitute cause for default, a habeas petitioner must first possess a constitutional right to assistance of counsel. U.S.C.A. Const.Amend. 6.

**[12] HABEAS CORPUS k690**
197k690
A petitioner has no constitutional right to assistance of counsel in state habeas proceedings, even though claims of ineffective assistance of trial counsel can only be raised on state collateral review. U.S.C.A. Const.Amend. 6.

**[13] HABEAS CORPUS k401**
197k401
To pass defaulted claims through the actual innocence portal, habeas petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.

**[14] HABEAS CORPUS k493(2)**
197k493(2)
A federal habeas petitioner is entitled to



relief on a challenge to the sufficiency of the evidence only if no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

**[15] SODOMY k1**
357k1
Under Virginia law, the elements of attempted forcible sodomy include an intent forcibly to sodomize an individual and a direct, but ineffectual, act toward achievement of sodomy.

**[16] HABEAS CORPUS k382**
197k382
Habeas petitioner's theory that victim of attempted sodomy had voluntarily gone to location of offense was defaulted, where that theory had never been presented previously to state courts.

**[17] SODOMY k6**
357k6
Evidence did not support defendant's claim that victim of attempted sodomy had consensually engaged in sexual activity; victim exhibited bruises on front of his neck, victim sustained multiple stab wounds, and there were transfer stains on back of victim's thighs.

**[18] HABEAS CORPUS k486(1)**
197k486(1)
In order to avoid the distorting effects of hindsight, a court, on federal habeas review, is required to evaluate the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. U.S.C.A. Const.Amend. 6.

**[19] HABEAS CORPUS k338**
197k338
Habeas petitioner's claim that state trial counsel were ineffective for failing to request appointment of a criminal investigator was procedurally defaulted, where petitioner never presented that claim to state courts. U.S.C.A. Const.Amend. 6.

**[20] CRIMINAL LAW k641.13(7)**
110k641.13(7)
State trial counsel were not deficient for failing to request psychiatric examination of defendant for purposes of sentencing in capital murder trial; expert had determined that defendant was sane at time of offense and was competent to stand trial, defendant refused to take test prior to sentencing, and mitigating value of such evidence would have been obscured by fact that defendant's purported mental infirmity was caused by sniffing glue and that defendant continued to abuse inhalants while incarcerated. U.S.C.A. Const.Amend. 6.

**[21] CRIMINAL LAW k641.13(5)**
110k641.13(5)
When a seemingly lucid and rational client rejects the suggestion of a psychiatric evaluation and there is no indication of a mental or emotional problem, a trial lawyer may reasonably forego insistence upon an examination.

**[22] CRIMINAL LAW k998(21)**
110k998(21)
Under Virginia law, a postconviction petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition.

**[23] HABEAS CORPUS k374.1**
197k374.1
In determining whether habeas petitioner was unable to present a claim to a state court in postconviction relief proceedings, for purposes of procedural default on federal habeas petition, the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition.

**[24] HABEAS CORPUS k407**
197k407
Habeas petitioner established cause for his failure to raise, in state court, the claim that his trial counsel had engaged in conflict of interest based on counsel's earlier representation of murder victim in juvenile proceedings; counsel did not disclose to petitioner the earlier representation of victim, and petitioner did not have access to the confidential juvenile records. U.S.C.A. Const.Amend. 6.

**[25] CRIMINAL LAW k641.5(.5)**
110k641.5(.5)
Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly if a conflict of interest arises during the course of a trial. U.S.C.A. Const.Amend. 6.

**[26] HABEAS CORPUS k481**
197k481
To establish actual prejudice from error at trial, habeas petitioner must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

**[27] CRIMINAL LAW k641.5(.5)**
110k641.5(.5)
To demonstrate that he was deprived of the Sixth Amendment right to conflict- free counsel, defendant can proceed on one of two theories: (A) that counsel had a potential conflict of interest that prejudiced his defense; or (B) that an actual conflict of interest adversely affected his lawyer's performance. U.S.C.A. Const.Amend. 6.

**[28] CRIMINAL LAW k641.5(.5)**
110k641.5(.5)
In the context of multiple or simultaneous representations, a lawyer has an actual, as opposed to a potential, conflict of interest when the interest of the petitioner and the other client diverged with respect to a material factual or legal issue or to a course of action. U.S.C.A. Const.Amend. 6.

**[29] CRIMINAL LAW k641.5(.5)**
110k641.5(.5)
A potential conflict of interest exists if the interests of the defendant may place the lawyer under inconsistent duties at some time in the future.

**[30] HABEAS CORPUS k487**
197k487
Even though habeas petitioner is not required to demonstrate prejudice from trial counsel's conflict of interest, he must show that the conflict was deleterious or harmful to counsel's advocacy. U.S.C.A. Const.Amend. 6.

**[31] CRIMINAL LAW k641.5(.5)**
110k641.5(.5)
To prove an adverse effect from trial counsel's conflict of interest, habeas petitioner must satisfy three elements: first, he must point to some plausible alternative defense strategy or tactic that might have been pursued; second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts; finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense.

**[32] CRIMINAL LAW k641.5(.5)**
110k641.5(.5)
Habeas petitioner failed to establish that his trial counsel engaged in an actual conflict of interest that prejudiced petitioner, by representing petitioner after having represented, in an earlier juvenile proceeding, the victim killed by petitioner, even though counsel should have disclosed his earlier representation of victim; there was no correlation between the two representations, counsel learned no confidential information from victim's case that was relevant to petitioner's defense, and there was no adverse effect from counsel's representation of both victim and petitioner. U.S.C.A. Const.Amend. 6.

**[33] CRIMINAL LAW k641.5(.5)**
110k641.5(.5)
For purpose of determining whether defense counsel has engaged in conflict of interest, substantial relatedness between the two matters exists when the present action and the past representation concern the very same subject matter or when the prior representation concerned the same criminal transactions and same events at issue in defendant's case. U.S.C.A. Const.Amend. 6.

**[34] CRIMINAL LAW k641.5(.5)**
110k641.5(.5)
The effective performance of counsel requires meaningful compliance with the duty of loyalty, and the duty to avoid conflict of interests can lead to ineffective representation. U.S.C.A. Const.Amend. 6.

**[35] CRIMINAL LAW k641.5(.5)**
110k641.5(.5)
Breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel; until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. U.S.C.A. Const.Amend. 6.

**[36] CRIMINAL LAW k641.5(7)**
110k641.5(7)
The duty to inquire into apparent conflicts of interest on part of trial counsel arises before the case winds its way to the particular court and judge tasked with conducting the defendant's trial. U.S.C.A. Const.Amend. 6.

**[37] CRIMINAL LAW k641.5(7)**
110k641.5(7)
Before appointing counsel for murder defendant, state court was required to inquire into possible conflict presented by fact that appointed counsel had previously represented victim in a juvenile matter. U.S.C.A. Const.Amend. 6.

**[38] HABEAS CORPUS k487**
197k487
Reversal of habeas petitioner's murder conviction was not warranted by failure of state court to inquire into possible conflict of interest that arose from defense counsel's prior representation of victim in a juvenile proceeding, where the potential conflict never ripened into an actual conflict. U.S.C.A. Const.Amend. 6.

***589** Robert E. Lee, Jr., Richmond, VA, Robert J. Wagner, Wagner & Wagner, Richmond, VA, for plaintiff.

Robert Q. Harris, Office of the Attorney General, Richmond, VA, for defendant.

***590** MEMORANDUM OPINION

PAYNE, District Judge.

Pursuant to 28 U.S.C. § 2254, Walter Mickens, a Virginia state prisoner, under sentence of death, filed a petition for a writ of habeas corpus challenging his conviction in the Circuit Court for the City of Newport News for capital murder. The Respondent has moved to dismiss the petition. After conducting an evidentiary hearing on one issue, the Court ordered further briefing. The action is ripe for disposition. Jurisdiction exists pursuant to 28 U.S.C. § 2254. [FN1]

FN1. Because Mickens filed his petition for a writ of habeas corpus after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") on

April 24, 1996, review of the petition is governed by the deferential standards of § 28 U.S.C. § 2254(d), as amended by the AEDPA. See Mueller v. Angelone, 181 F.3d 557, 570 (4th Cir.1999); Green v. French, 143 F.3d 865, 868 (4th Cir.1998), cert. denied, --- U.S. ----, 119 S.Ct. 844, 142 L.Ed.2d 698, (1999).

## I. SUMMARY OF THE RECORD

On June 3, 1993, a jury, sitting in the Circuit Court for the City of Newport News, found Mickens guilty of the capital murder of Timothy Jason Hall in the commission of, or subsequent to the commission of, attempted forcible sodomy. On June 7, 1993, the jury concluded that Mickens would pose a future danger to society and that the murder was outrageously and wantonly vile and thereupon fixed Mickens' punishment at death. Mickens appealed his conviction and sentence to the Supreme Court of Virginia.

Upon review of the evidence, conducted in the light most favorable to the Commonwealth, the Supreme Court of Virginia found the following:

On March 28, 1992, Timothy Jason Hall, age 17, resided with 14-year-old Raheem Gordon and Gordon's father in an apartment located at 28th and Washington Streets in the City of Newport News. Hall and Gordon were roommates, and they often exchanged clothes, including shoes.

That day, between 7:00 and 8:00 p.m., Hall gave Gordon a ride, in Hall's automobile, to a party at the nearby Towers apartment building. At the time, Hall was wearing a pair of Gordon's Nike brand "Cross Trainer" tennis shoes. He also was wearing blue jeans and a shirt imprinted with either the word, "Duke," or the words, "Miami Hurricanes." Hall had intended to return to the party, but he never did. Neither Gordon nor his father ever saw Hall after that evening.

Vincent West and Bruce Mitchell also attended the party. About 8:00 p.m., they left the party and went to a nearby convenience store. After purchasing a few items and leaving the store, they sat in a park adjacent to the Towers apartment building. While sitting there, West and Mitchell saw a man with a bicycle, hiding in some bushes and looking at them. The man later was identified as the defendant, Mickens.

The following day, Gordon saw Hall's automobile. It was parked on West Avenue, near 28th Street, close to the Towers apartment building and in the same place it had been parked the previous night.

On March 30, 1992, about 12:30 p.m., Chris Basford was walking along the James River between 25th and 30th Streets when he saw a body beneath an abandoned construction company building. The body of a male Caucasian was lying face down on a mattress under a sheet of plywood. The body was nude from the waist down, except for white athletic socks, and its legs were spread apart approximately 12 inches. The victim was identified as Timothy Jason Hall.

Pubic hairs were recovered from the victim's buttocks. Bloody "transfer" stains were evident on the outsides of the victim's thighs, and a white liquid substance was observed close to the victim's ***591** anus. Cigarette butts lying near the mattress also were recovered, and the mattress cover was seized for scientific examination. Nearby, the police found a pair of men's blue jeans and white underwear shorts that had washed up in the surf of the river. Gordon identified the clothes as those worn by Hall on the evening of March 28, 1992.

An autopsy revealed 143 separate "sharp force injuries" to the victim's body. Of the injuries, 62 were paired stab injuries that could have been caused by a multiple-blade knife, 13 were single stab wounds, and three were paired incised wounds.

The medical examiner who performed the autopsy concluded that the victim had bled to death and that 25 of the 143 wounds were fatal. The fatal wounds included four pairs of stab wounds that punctured the right lung, three single stab wounds that punctured the left lung, seven stab wounds to the skull that penetrated the brain, a stab wound to the forehead that also penetrated the brain, one pair of stab wounds that perforated the liver, and a pair of stab wounds to the right neck that severed the carotid artery and the jugular vein.

The medical examiner opined that the fatal wounds may not have caused instant death. Instead, she estimated that the victim could have lived as long as 30 to 40 minutes after infliction of the last wound and that, during this time, the victim may have been conscious.

On the evening of April 4, 1992, the police were informed that a black male, wearing a blue and white jacket and riding a bicycle, had assaulted a juvenile. Responding to this information, Police Officer D.A. Seals and Detective Dallas Mitchell found Mickens riding a bicycle in the parking area of the abandoned construction company building.

Seals exited the police car, displayed his badge, and approached Mickens. Mickens, thereupon, fled on his bicycle. Shortly thereafter, Seals and Mitchell again came upon Mickens as he was being detained by other police officers. Mickens was arrested at 7:00 p.m. on the charges involving the juvenile.

Mickens agreed to talk with the police after being advised of his Miranda rights. Officer Mitchell told Mickens that he knew Mickens had killed Hall, but the officer did not tell Mickens how Hall had been murdered. In denying involvement in Hall's murder, Mickens said, "You didn't find any knife on me; did you?"

The following morning, warrants were obtained charging Mickens with Hall's murder and attempted sodomy. When Officer Seals handed Mickens copies of the warrants, Mickens said, "I accept the warrants, I accept the charges." Seals asked Mickens what was meant by that statement, and Mickens responded, "Mother f__r, if I told you I accept the warrants that means I'm guilty, don't it?"

On April 7, 1992, the police found Michael Jacobs wearing the Nike brand "Cross Trainer" tennis shoes that Hall had been wearing when Gordon had last seen Hall alive. Jacobs told the police that he had bought the shoes from Mickens for $5.00 the previous week.

An examination of the pubic hairs removed from Hall's buttocks revealed that they were from an African-American and were alike in "all identifiable microscopic characteristics" to the pubic hair sample taken from Mickens. The expert who examined the hairs further testified that the hairs could not have originated from Hall because he was a Caucasian. The witness also stated that tissue was attached at the roots of the hairs, indicating the hairs had been forcibly removed, possibly by the rubbing of the genitals against Hall's buttocks.

An examination of a stain found on the mattress cover revealed human sperm. Through DNA analysis (RFLP type) [footnote omitted] of the sperm and of blood samples taken from Hall ***592** and Mickens, the expert determined that Hall could not have produced the stain. The expert determined further that Mickens' DNA pattern matched the DNA pattern in the stain on the mattress cover. The witness also stated that the approximate percentages of the population that could have deposited the stain was one in 27,000 Caucasians, one in 6,000 African-Americans, and one in 2,000 Hispanics.

The cigarette butts and certain other hairs

recovered at the crime scene also were subjected to DNA analysis (PCR type). [footnote omitted] Both Hall and Mickens had D.Q. Alpha type 1.2, 4. The expert making the comparisons determined that Mickens could not be eliminated as the source of the hairs and of the saliva on the cigarette butts. Mickens smoked cigarettes, and Hall was never known to smoke cigarettes.

Tyrone Brister testified that, when he and Mickens shared a holding cell at the courthouse on March 26, 1993, he asked Mickens why he was in the cell. Mickens answered, "They said I stabbed somebody 140 something times in the head." Mickens then lowered his voice and said, "which I did." Mickens also told Brister that "they" said he also sodomized the victim and stole his sneakers. Again, Mickens lowered his voice and said, "which I did."

Mickens v. Commonwealth, 247 Va. 395, 442 S.E.2d 678, 681-83 (1994). [FN2]

FN2. The findings of fact made by the Supreme Court of Virginia are binding on this Court. See 28 U.S.C. § 2254(e)(1); Pope v. Netherland, 113 F.3d 1364, 1367 (4th Cir.), (citing Sumner v. Mata, 449 U.S. 539, 546-47, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)), cert. denied, 118 S.Ct. 16 (1997).

Following Mickens' unsuccessful appeal to the Supreme Court of Virginia, the Supreme Court of the United States remanded the case to the Supreme Court of Virginia for further consideration in light of Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (holding a capital defendant has a right to inform his sentencing jury that he is ineligible for parole). See Mickens v. Virginia, 513 U.S. 922, 115 S.Ct. 307, 130 L.Ed.2d 271 (1994). The Supreme Court of Virginia thereafter remanded the matter to the trial court for resentencing. See Mickens v. Commonwealth, 249 Va. 423, 457 S.E.2d 9 (1995).

At the resentencing proceedings, Mickens was represented by the same lawyers who had represented him at trial. The trial court conducted a new sentencing hearing before a jury. After hearing evidence in aggravation and in mitigation, the jury fixed Mickens' punishment at death, based upon both the "vileness" and the "future dangerousness" predicates of Virginia's death penalty statutes. See Mickens v. Commonwealth, 252 Va. 315, 478 S.E.2d 302 (1996), cert. denied, 520 U.S. 1269, 117 S.Ct. 2442, 138 L.Ed.2d 202 (1997). After conducting a post-trial hearing pursuant to Va.Code Ann. § 19.2-264.5 (Michie 1995), the Circuit Court of the City of Newport News followed the jury's recommendation and sentenced Mickens to death.

Mickens subsequently appealed his sentence. The Supreme Court of Virginia denied the appeal. See Mickens v. Commonwealth, 252 Va. 315, 478 S.E.2d 302, 304 (1996), cert. denied, 520 U.S. 1269, 117 S.Ct. 2442, 138 L.Ed.2d 202 (1997). Then, Mickens filed a petition for a writ of habeas corpus with the Supreme Court of Virginia. That petition was denied summarily without explanation of the reasons.

On February 24, 1998, Mickens filed a motion for the appointment of counsel to represent him in filing a federal habeas corpus petition. Counsel were appointed and Mickens filed a petition in which he raised the following grounds for relief.

## II. GROUNDS FOR FEDERAL HABEAS CORPUS RELIEF

Mickens' claims are restated verbatim from his petition:

*593 1. The evidence was insufficient to convict Mr. Mickens of attempted forcible sodomy because there was no evidence adduced at trial to indicate that the intent of the attacker was to attempt to forcibly sodomize Hall, especially because the act was consummated and there was no trauma to the anus of the victim.

2. The evidence was insufficient to convict Mr. Mickens of capital murder since the evidence was insufficient to prove attempted forcible sodomy and, without the predicate offense, there can be no conviction for a capital offense.

3. Petitioner was denied his Sixth Amendment right to the effective assistance of counsel when trial counsel failed to investigate the facts surrounding the crime, and failed to request an investigator.

4. Petitioner was denied his Sixth Amendment right to the effective assistance of counsel due to trial counsel's failure to request a psychiatric evaluation for Petitioner's sentencing, pursuant to Ake v. Oklahoma, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) and Va.Code § 19.2- 264.3:1.

5. Petitioner was denied his Sixth Amendment right to the effective assistance of counsel because his trial counsel labored under an actual conflict of interest which adversely affected his performance; trial counsel represented both the defendant and the victim.

6. Petitioner was denied his Fifth Amendment right to due process of law and his Sixth Amendment right to the effective assistance of counsel when the trial judge of the Newport News Juvenile and Domestic Relations Court failed to inform Petitioner of the conflict of interest and inquire of the Petitioner whether he was aware of the conflict.

7. Petitioner was denied the effective assistance of counsel when counsel failed to investigate and present the defense of consent to the charge of attempted forcible sodomy, despite the obvious indications pointing to a consent defense.

8. Petitioner was denied the effective assistance of counsel when counsel failed to present any evidence in mitigation at the sentencing hearing, and when counsel presented an unreasonable closing argument at the sentencing.

9. Petitioner was denied his Sixth Amendment right to the effective assistance of counsel because trial counsel failed to request a mistrial when the jury found him guilty of capital murder, without finding him guilty of the underlying predicate offense, attempted forcible sodomy.

10. Petitioner was denied due process of law, and was denied the effective assistance of counsel, when he was resentenced by a jury which had not heard the evidence against him, thereby depriving the jury from considering residual doubt as a mitigating factor in determining the sentence.

11. Petitioner was denied the effective assistance of counsel by counsel's failure to effectively cross-examine crucial prosecution witnesses.

12. The refusal to excuse juror Frank Johnson for cause based solely on the juror's representations to the court denied Mickens the right to an impartial jury.

The assessment of these twelve claims must be made in perspective of certain fundamental principles which circumscribe the reach of the review of state court judgments by federal courts in habeas corpus proceedings.

## *594 III. EXHAUSTION AND PROCEDURAL BAR

[1][2][3][4] The first of those principles is the doctrine of exhaustion which, simply stated, is that, "[i]n the interest of giving the

state courts the first opportunity to consider alleged constitutional errors occurring in a state prisoner's trial and sentencing, a state prisoner must exhaust all available state remedies before he can apply for federal habeas relief." See Breard v. Pruett, 134 F.3d 615, 619 (4th Cir.1998) (citing Matthews v. Evatt, 105 F.3d 907, 910-11 (4th Cir.), cert. denied, 522 U.S. 833, 118 S.Ct. 102, 139 L.Ed.2d 57 (1997)), cert. denied 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998). "To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court." See Matthews, 105 F.3d at 911. "Fair presentation contemplates that both the operative facts and the controlling legal principles must be presented to the state court." Id. (internal quotations omitted). Thus, in state court, the petitioner is obligated to identify the federal constitutional right purportedly infringed, identify the facts thought to support such a violation, and to explain how those facts establish a violation of his constitutional rights. Mallory v. Smith, 27 F.3d 991, 994 (4th Cir.1994). It is important to remember, therefore, that "[t]he exhaustion requirement is not satisfied if the petitioner presents new legal theories or factual claims for the first time in his federal habeas petition." Breard, 134 F.3d at 619.

[5][6][7] A distinct, but related, limit on the scope of habeas corpus review in federal court is the doctrine of procedural default. Pursuant to that doctrine, if a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the petitioner has procedurally defaulted his federal habeas claim in federal court. Id. at 619. A procedural default also occurs when a federal habeas petitioner has failed to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." Coleman v. Thompson, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Absent a showing of cause and prejudice or a fundamental miscarriage of justice, a federal habeas court is precluded from reviewing the merits of a defaulted claim.

Several of these procedural rules apply to the assessment of Mickens' claims. First, under the rule in Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), a Virginia inmate is precluded from raising claims in state habeas proceedings if they could have been raised at trial and on direct appeal but were not. Under Va.Code § 8.01-654(B)(2), "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." Hoke v. Netherland, 92 F.3d 1350, 1354 n. 1 (4th Cir.1996) (internal quotations omitted). Finally, under Va.Code Ann. § 8.01-654.1 (Michie 1995), capital habeas petitioners are required to submit any habeas petition within sixty days after the Supreme Court of the United States denies a petition for a writ of certiorari.

Only Claims 1, 2, and 4 have been properly presented to the Supreme Court of Virginia. Mickens contends that the default of Claims 7 through 12 is excused because he has demonstrated cause and prejudice or a fundamental miscarriage of justice. Mickens' arguments of cause sufficient to excuse the default of Claims 7 through 12 and the assertion of actual innocence as to those claims will be addressed first. Discussion of the procedural posture of Claims 1, 2, 3, 4, 5 and 6 will be assessed along with the merits of those claims.

A. Cause Excusing Default of Claims 7



Through 12

[8][9] Claims 7 through 12 are defaulted under the principles of exhaustion and ***595** procedural bar. To demonstrate "cause" which will excuse the default of Claims 7 through 12, Mickens must establish "that some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court at the appropriate time. Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Ineffective assistance of counsel may constitute "cause" for a procedural default under certain circumstances. Id. at 488, 106 S.Ct. 2639.

A topic heading in the petition suggests that Mickens can demonstrate cause and prejudice and actual innocence which will excuse the admitted default of Claim 12. See Pet. at 10. However, Mickens fails to specify the basis for that contention in the body of the petition, as required by the Order entered April 7, 1998. Moreover, the arguments of cause put forth by Mickens in support of his Claims 7 through 11 are simply inapplicable to Claim 12. Thus, Mickens' suggestion that he can demonstrate cause and prejudice excusing his default of Claim 12 will receive no further consideration.

[10] Mickens contends that ineffective assistance of his state habeas counsel excuses the acknowledged default of Claims 7, 8, 9, 10 and 11. In support of that contention, Mickens avers by affidavit that: (1) his first communication with state habeas counsel, George B. Pavek, was when Pavek handed Mickens a completed habeas petition for signature; (2) he does not read or write at a level which would allow him to have understood the contents of that petition; (3) Pavek told Mickens that he must sign the petition that day or the court would lose authority to review his case; and (4) he "neither had any input into the contents of the [state habeas] petition, nor did he have an opportunity to review the petition." (Pet. at 52.) Under those circumstances, Mickens contends that he should not bear the consequences of Pavek's failure to raise Claims 7 through 11 in the state habeas proceedings. See Deutscher v. Angelone, 16 F.3d 981, 984 (9th Cir.1994) (refusing to find inmate's second habeas petition successive when inmate's first petition was not signed or otherwise authorized by the petitioner).

[11][12] The assertions of cause presented here by Mickens lack the legal and factual predicates to support a finding of cause. First, for an error of counsel to constitute cause, a petitioner must first possess a constitutional right to assistance of counsel. See Coleman v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). A petitioner has no constitutional right to assistance of counsel in state habeas proceedings, even though claims of ineffective assistance of trial counsel can only be raised on state collateral review. See Mackall v. Angelone, 131 F.3d 442, 449 (4th Cir.1997) (en banc), cert. denied, 522 U.S. 1100, 118 S.Ct. 907, 139 L.Ed.2d 922 (1998); Weeks v. Angelone, 176 F.3d 249, 273-74 (4th Cir.)(reiterating that the alleged ineffective assistance of habeas counsel cannot constitute cause to excuse a petitioner's defaulted ineffective assistance of trial counsel claims), cert. granted on other grounds, --- U.S. ----, 120 S.Ct. 30, 144 L.Ed.2d 833 (1999); Satcher v. Netherland, 944 F.Supp. 1222, 1263- 64 (E.D.Va.1996), rev'd on other grounds, 126 F.3d 561 (4th Cir.), cert. denied, 522 U.S. 1010, 118 S.Ct. 595, 139 L.Ed.2d 431(1997). Under the law in this circuit, there is no constitutional right to counsel on state habeas review and thus ineffective assistance of state habeas counsel (even if shown) does not constitute cause.

Secondly, Mickens' suggestion that

limitations on his literacy capacity precluded participation in the state habeas proceedings is completely lacking in merit. The record shows that Mickens could, and did, read his state habeas petition. [FN3] (State Habeas Pet. at 31.) Even if that were not so, Mickens' notarized signature, attached to his state habeas petition reflects, "I have ***596** read, and have had read to me, the foregoing petition for a writ of habeas corpus and attached motions, and papers." Id. (emphasis added). Hence, that ground for cause is rejected as entirely lacking in factual support. See Kornahrens v. Evatt, 66 F.3d 1350, 1359 (4th Cir.1995) (noting that once a court finds the absence of cause, it should not consider the issue of prejudice so as to avoid making alternative holdings).

FN3. (5/20/93 Hr. T. at 117, 139); (3/29/96 Hr. T. at 22); (1/13/99 Hr. T. at 196.)

B. Actual Innocence

[13] Initially, in his federal petition for a writ of habeas corpus, Mickens asserted that the default of Claims 7 through 11 [FN4] should be excused because "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). To pass defaulted claims through the actual innocence portal, Mickens must show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Id. Subsequently, Mickens conceded to this Court that he had failed to present sufficient evidence to show that he was actually innocent. (10/7/98 Hr. T. at 44.) The record demonstrates the wisdom of that concession. See infra Sec. IV. For the foregoing reasons, Claims 7 through 12 are defaulted and will be dismissed.

FN4. There is no reference to actual innocence in the body of Claim 12.

## IV. CLAIMS 1 AND 2: SUFFICIENCY OF THE EVIDENCE

In Claim 1, Mickens asserts that the evidence was insufficient to sustain a conviction of attempted forcible sodomy and that, absent sufficient proof of that underlying predicate offense, the conviction for the murder of Hall subsequent to the attempted forcible sodomy also must fail (Claim 2).

[14][15] A federal habeas petitioner is entitled to relief on a challenge to the sufficiency of the evidence only if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In Virginia, the elements of attempted forcible sodomy include an intent forcibly to sodomize an individual and a direct, but ineffectual, act toward achievement of sodomy. See Mickens v. Commonwealth, 247 Va. 395, 442 S.E.2d 678, 687 (1994).

On direct appeal, Mickens claimed that:

> the Commonwealth failed to prove that he 'intended to commit forcible sodomy or that he did any act towards the commission of the act that amounted to the commencement of the act.' He further contends that the Commonwealth failed to prove that he was the criminal agent in Hall's death.

Id.

The Supreme Court of Virginia held that the evidence "clearly established the requisite elements of attempted forcible sodomy":

> Hall's body, naked from the waist down, was found lying face down on a mattress under an abandoned building. His legs were spread apart 12 inches. A white lubricant was on Hall's buttocks near his anus. African-American pubic hairs found on Hall's buttocks were like Mickens' pubic hairs in "all identifiable microscopic characteristics." Tissue attached to the roots of the hairs, indicating that the hairs had been forcibly removed, was consistent with Mickens' having rubbed his genitals against Hall's buttocks. Bloody "transfer" stains were evident on Hall's thighs, and a semen stain found on the mattress cover was consistent with Mickens' DNA pattern. Additionally, Mickens' statements to Officer Seals and to Tyrone Brister confirmed that Mickens had attempted to commit forcible sodomy.

Id. at 688; see Wilson v. Greene, 155 F.3d 396 406-7 (4th Cir.) (rejecting similar challenges ***597** to sufficiency of the evidence for attempted rape), cert. denied, --- U.S. ----, 119 S.Ct. 536, 142 L.Ed.2d 441 (1998).

[16] In his federal petition, Mickens suggests, for the first time, that the evidence was insufficient to sustain that conviction because the evidence failed to show that "Mr. Hall was subjected to any sexual activity against his will, by threat, force or intimidation [and, according to Mickens] ... the evidence indicated that Mr. Hall went to the location voluntarily." (Pet. at 15.) That theory is defaulted because it has never been presented previously to the state courts. Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir.), cert. denied, 522 U.S. 833, 118 S.Ct. 102, 139 L.Ed.2d 57 (1997).

[17] Moreover, the theory ignores the fact that Hall exhibited bruises on the front of his neck, that he sustained multiple stab wounds, and that there was a transfer stain on the back of his thighs. [FN5] (5/26/93 Tr. T. at 509- 10.) The bruises on Hall's neck and the stab wounds are consistent with use of a choke hold and a knife, both of which are indicia of the use of force. And, the transfer stains on the back of Hall's thighs indicate that the killer was stabbing Hall from behind while attempting to sodomize Hall, or before having done so. That evidence forecloses the possibility that any rational finder of fact could conclude that Hall was engaging in consensual sexual activity immediately before his death. For the foregoing reasons, Claims 1 and 2 will be dismissed.

FN5. Bloody "transfer" stains occur when an object comes into contact with blood and thereafter comes in contact with another surface, thereby leaving a stain on that other surface.

## V. CLAIMS 3 AND 4: ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL

In Claims 3 and 4, Mickens contends that he was denied effective representation by trial counsels' inadequate pretrial investigation (Claim 3) and by trial counsels' failure to request a psychiatric evaluation for sentencing (Claim 4).

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court held that to demonstrate the ineffective assistance of counsel, a defendant first must show that counsel's representation was deficient and, then, must establish that the deficient performance prejudiced the defense. Id. at 687, 104 S.Ct. 2052. At bottom, in assessing prejudice, it is important to focus on "whether the result of the proceeding was fundamentally unfair or unreliable." Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

[18] The deficient performance facet of the Strickland test "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

Amendment." 466 U.S. at 688, 104 S.Ct. 2052. To satisfy this facet of Strickland, the defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id. at 687-88, 104 S.Ct. 2052. The standard for deficient performance is "not merely below average performance; rather, the attorney's actions must fall below the wide range of professionally competent performance." Griffin v. Warden, Maryland Correctional Adjustment Center, 970 F.2d 1355, 1357 (4th Cir.1992). Furthermore, in order to avoid the distorting effects of hindsight, a court, on federal habeas review, is required to evaluate "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. 2052. Finally, the defendant must overcome the "strong presumption ... that, under the circumstances, the challenged action, 'might be considered sound trial strategy' " (if, of course, the challenged action was a matter of trial strategy). Id. at 689, 104 S.Ct. 2052 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). With these principles in mind, it ***598** is appropriate to assess the arguments made by Mickens in Claims 3 and 4.

A. Pretrial Investigation (Claim 3)

[19] In state court, Mickens alleged that trial counsel were ineffective for failing to request the appointment of a criminal investigator, which "prevented the petitioner from developing and investigating any issues or facts that may have pointed to the fact that someone else may have been involved." (State Habeas Petition at 23, 27-8.) (emphasis added). In Claim 3 of this federal petition, Mickens asserts that he was denied the effective assistance of counsel because trial counsel: (1) failed to investigate a consent defense; and (2) failed to request an investigator to gather evidence to support a consent defense or to gather mitigating evidence. The record shows that Mickens has never given the Virginia courts a fair opportunity to evaluate the adequacy of counsels' investigation or their failure to request the appointment of an investigator to explore evidence of consent and mitigating circumstances. Claim 3, therefore, is defaulted and will be dismissed. [FN6]

> FN6. Additionally, Claim 3 lacks substantive merit. In light of the facts facing counsel, see infra Sec. VI(E)(1), counsel reasonably chose not to pursue a consent defense. Furthermore, the lack of mitigating evidence is attributable to absence of such evidence rather than the failings of counsel.

B. Psychiatric Examination (Claim 4)

[20] In Claim 4, Mickens contends that trial counsel were deficient for failing to request a psychiatric examination of petitioner for purposes of sentencing. Mickens suggests that, if trial counsel had requested such an examination, the expert could have testified that Mickens had sustained organic brain damage and therefore had a diminished mental capacity. That evidence would have been mitigating of the offense, says Mickens. The challenge to the performance of trial counsel on this ground is "a product of hindsight and fails to address the facts reasonably relied upon by counsel at the time [of trial and sentencing]." Roach v. Martin, 757 F.2d 1463, 1478 (4th Cir.1985).

For instance, before trial, one of Mickens' trial counsel, Bryan Saunders, asked the court to have Mickens evaluated for competence to stand trial and for sanity at the time of the offense. (Resp.'s Mot. to Dis. Ex. C. at ¶ 7.) Pursuant to that request, the court appointed Dr. Killian to conduct evaluations of Mickens. Dr. Killian determined that Mickens was sane at the time of the offense and that he was competent to stand trial. Id. Counsel's performance cannot be faulted on that issue.

Also, in preparation for the penalty phase, trial counsel reviewed Mickens' prison file. Id. at ¶ 8. The file contained a notation which indicated that Mickens may have organic brain damage as a result of sniffing inhalants. [FN7] Id. Saunders conveyed that information to Dr. Killian and asked him whether there was anything in his examinations that would confirm the notation. Id. Dr. Killian told Saunders that "he did not have any reason to suspect any problem of brain damage," but he offered to test Mickens. Id. Therefore, arrangements were made to transport Mickens for testing, but Mickens refused to take the test. Id. Nonetheless, at his first sentencing, Mickens presented evidence, through his testimony and that of his mother, which suggested his aberrant behavior was linked to his history of having sniffed glue.

> FN7. The trial transcripts reflect that Mickens was lucid and rational. Mickens does not assert that trial counsel were aware of any other evidence which would cause them to doubt his mental condition.

[21] To have been effective, counsel was not required to second guess Dr. Killian's conclusion or to devote additional time pursuing what appeared to have been an unfruitful line of investigation. Wilson v. Greene, 155 F.3d 396, 403 (4th Cir.), cert. ***599** denied, 119 S.Ct. 536, 119 S.Ct. 536, 142 L.Ed.2d 441 (1998). Moreover, "there is no constitutional basis for a rule that would require a psychiatric evaluation in every capital case." Clanton v. Bair, 826 F.2d 1354, 1358 (4th Cir.1987). Thus, "when a seemingly lucid and rational client rejects the suggestion of a psychiatric evaluation and there is no indication of a mental or emotional problem, a trial lawyer may reasonably forego insistence upon an examination." Id. In this instance, trial counsel were assured by both Mickens' conduct and a mental health expert that significant mitigating evidence pertaining to organic brain damage simply was not available. Under such circumstances, counsel reasonably chose not to insist on further mental evaluations.

Finally, although it was reasonable initially to have cast Mickens' purported inhalant induced mental infirmity into the mix of mitigating evidence, an extended defense focused on that issue was unlikely to have been of benefit to Mickens because "[m]ental health evidence like that of [a petitioner's] organic brain dysfunction is a double-edged sword that might as easily have condemned [petitioner] to death as excused his actions." Truesdale v. Moore, 142 F.3d 749, 755 (4th Cir.1998). Here, the mitigating value of such evidence (had it been offered) would have been obscured by the fact that Mickens' purported mental infirmity was caused by sniffing glue and that Mickens continued to abuse inhalants while incarcerated. For the foregoing reasons, Claim 4 will be dismissed.

VI. CLAIMS 5 AND 6: CONFLICT OF INTEREST

In Claim 5, Mickens contends that he was denied effective assistance of counsel because his lead trial counsel, Bryan Saunders, was representing the victim, Timothy Hall, at the time of Hall's murder. In Claim 6, Mickens makes the related claim that the failure of the Newport News Juvenile and Domestic Relations Court (hereinafter "JDR Court") to inquire into the conflict denied him due process and effective assistance of counsel. The procedural

history pertinent to these claims is set forth below (and it is undisputed):

. On February 21, 1992, Janet Heywood, Timothy Hall's mother, swore out a warrant for assault and battery against her son. Heywood alleged that, on February 16, 1992, Hall grabbed her by the arms and shoved her to the ground.

. On or about March 13, 1992, Timothy Hall was charged by Newport News police with possession of a concealed weapon (a serrated bread knife wrapped in paper). Hall was directed to appear before the JDR Court for the assault and concealed weapons charges on March 20, 1992.

. At the March 20, 1992 hearing, Substitute Judge Paul Criver, Jr., of the JDR Court appointed Bryan Saunders to represent Hall and the hearing was continued until April 3, 1992.

. Sometime between March 20 and March 28, 1992, Hall came to Saunders' office for an interview which lasted fifteen to thirty-minutes. (1/13/93 Hr. T. at 98.) [FN8] The discussion was confined to the circumstances surrounding each of the charged crimes. (12/23/98 Dep. at 11-26.)

FN8. On January 13, 1999, this Court conducted an evidentiary hearing on Claims 5 and 6. Citations to the record of that hearing will be abbreviated as "1/13/99 Hr. T." Also, Mickens has tendered a copy of the transcript of Saunders' deposition conducted on December 23, 1998. Citations to that record will be abbreviated as "12/23/98 Dep."

. On March 28, 1992, Hall was seen alive for the last time.

. On March 30, 1992, Hall's body was discovered.

. On April 3, 1992, Judge Foster of the JDR Court removed the charges against Hall from the docket and dismissed them, noting that the defendant is deceased.

***600** On the same date, Saunders appeared at the JDR court for a hearing on Hall's assault and concealed weapons charges. (1/13/99 Hr. T. at 96-97.) Someone (the identity of whom Saunders does not recall) told Saunders that Hall was dead and that the pending cases had been dismissed. Id. at 97.

. On April 4, 1992, Mickens was arrested.

. On April 6, 1992, Judge Foster of the JDR Court appointed Saunders to represent Mickens.

It is undisputed that Mickens was unaware of Saunders' previous representation of Hall until federal habeas corpus proceedings were initiated. Even then, the discovery of these facts was purely fortuitous. In particular, Mickens' federal habeas counsel visited the JDR Court to review Mickens' JDR file. Counsel asked the clerk on duty for any files involving Timothy Hall. Of course, files of a juvenile are confidential and should not have been produced without a court order. See Virginia Code Ann. § 16.1-305 (Michie 1996). Nonetheless, a clerk of the JDR Court inadvertently produced Hall's file on the assault and concealed weapons charges. It was then that federal habeas counsel discovered that Saunders previously had represented Hall and requested a copy of the files. The clerk's supervisor intervened, discovered that Hall's file had been improperly disclosed and refused to allow counsel any further access to Hall's files. Subsequently, Hall's files were produced to Mickens' counsel by judicial process.

[22] The Respondent has moved to dismiss Claims 5 and 6 on the ground that they are procedurally barred because they were not presented in Mickens' first state habeas petition. See Va.Code. §§ 8.01-654(B)(2) [FN9]; 8.01-654.1. [FN10] Mickens counters that, in establishing a conflict of interest on the part of Saunders, he has shown cause and prejudice excusing the



default.

FN9. Under Virginia law, "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." Hoke v. Netherland, 92 F.3d 1350, 1354 n. 1 (4th Cir.1996) (citing 8.01-654(B)(2)). Whether this claim was reasonably available will be considered as part of the discussion of cause and prejudice (see pp. 600-01 infra ).

FN10. Va.Code § 8.01-654.1 requires capital defendants to file a habeas petition within sixty days of the denial of his petition for certiorari. The last paragraph of that section provides, "notwithstanding the time restrictions otherwise applicable to the filing of a petition for a writ of habeas corpus, an indigent prisoner may file such a petition within 120 days following appointment, made under § 19.2-163.7, of counsel to represent him." Neither Mickens nor Greene suggests this sentence provides Mickens with an opportunity to file another habeas petition with the Supreme Court of Virginia. Cf. Graham v. Angelone, No. 99-4, 191 F.3d 447, 1999 WL 710385, at *10 (4th Cir. Sept.13, 1999) (refusing to extend time for filing capital state habeas petition when new counsel appointed shortly before the deadline).

A. Cause Excusing Default of Claims 5 and 6

[23][24] Mickens contends that he has satisfied the cause requirement because the facts supporting the conflict of interest claim were "not reasonably available" before the completion of his state proceedings. McCleskey v. Zant, 499 U.S. 467, 493-94, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)). "The question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition." Barnes v. Thompson, 58 F.3d 971, 975 (4th Cir.1995). Here, Saunders' silence and state law requirements for secrecy of juvenile court records operated together to preclude Mickens from raising the conflict of interest claims in his state habeas petition.

It is undisputed that Mickens did not know of the conflict of interest here asserted. And, there were only two sources ***601** from which Mickens could have discovered that Saunders had represented Hall before representing Mickens: Saunders and the Newport News JDR Court. Saunders kept silent, thereby breaching his duty of disclosure. State law foreclosed any access to the JDR Court. On this record, Mickens' failure to explore either of these sources before completion of his state habeas proceedings cannot be characterized as unreasonable.

[25] Because the primary responsibility for discerning conflicts of interests and revealing them to clients and to the courts rests with counsel, Saunders' silence impliedly assured Mickens that there were no potential conflicts from the representation of any previous clients See Cuyler v. Sullivan, 446 U.S. 335, 346, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly if a conflict of interest arises during the course of a trial." Id. Whether a lawyer can represent multiple or successive clients is circumscribed by the lawyer's inescapable

duty to "explain any circumstances that might cause a client to question his undivided loyalty." Va.Code of Professional Responsibility EC 5-19 (Michie 1992). Saunders' representation of the murder victim, at the time of the murder, is undoubtedly a circumstance "that might cause a client to question his undivided loyalty." Id.

Therefore, Saunders was obligated either to have declined appointment to the Mickens' case, or to have fully disclosed to Mickens the fact of his previous representation of Hall and the possible effects that his previous representation of Hall might have on his ability to represent Mickens. Dowell v. Commonwealth, 3 Va.App. 555, 351 S.E.2d 915, 917-18 (1987). And, the full disclosure option also obligated Saunders to explain that Mickens' consent would be required before Saunders could continue the representation. See Va.Code of Professional Responsibility DR 5-105; EC 5-15; EC 5-17; EC 5-19.

Saunders also was required to have disclosed the previous representation to the appointing court and that would have meant that the facts surrounding the previous representation would have been fully explained on the record. In other words, Saunders' representation would have been permitted only after a full inquiry. See Wood v. Georgia, 450 U.S. 261, 272, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); Cuyler v. Sullivan, 446 U.S. 335, 346-47, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Holloway v. Arkansas, 435 U.S. 475, 485, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); Kirkpatrick v. Butler, 870 F.2d 276, 284 (5th Cir.1989); Edmonds v. Jabe, 874 F.Supp. 730, 736 (W.D.Va.1995) (finding conflict of interest claim was not reasonably available when only mention of conflict was in a single sentence buried in a psychiatric report prepared for sentencing). Considering Saunders' silence in the face of these duties and the absence of any indication in the trial record that a conflict might have existed, Mickens had no reason to even consider the possibility that a conflict existed. See Edmonds, 874 F.Supp. at 736. Furthermore, his state habeas counsel had no reason to explore the matter.

Nonetheless, and without any credible decisional support, the Commonwealth persists in asserting that Claims 5 and 6 were reasonably available to state habeas counsel because federal habeas counsel discovered the factual basis of the claim. It is charitable to call that argument frivolous because the fortuitous circumstances by which federal habeas counsel discovered the truth about Saunders' conflict prove beyond question that Mickens did not fail in his duty to inquire in the state court proceedings. See Amadeo v. Zant, 486 U.S. 214, 224, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988). Mickens had no reason to suspect that Saunders would violate the disclosure obligations imposed on him by state law. Nor is there fault to be found in state habeas counsel's failure to request Hall's JDR files because they were imbued with confidentiality by state law. Federal ***602** habeas counsel uncovered the conflict by virtue of the error of the Clerk of the JDR Court. And, when that error was discovered, the records were taken from federal habeas counsel. They were disgorged again only by virtue of a subpoena. Thus, the factual predicate for Claims 5 and 6 simply was not available to Mickens in state court nor was it discoverable through the exercise of diligent investigation. To argue otherwise is disingenuous. On this record, Mickens has established cause, the first step for excusing his default of Claims 5 and 6.

B. Prejudice Excusing Default of Claims 5 and 6



[26] To establish actual prejudice, Mickens "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). Where the defaulted claim involves an actual conflict of interest on the part of counsel, the prejudice inquiry incorporates the test for establishing the underlying claim. See Williams v. French, 146 F.3d 203, 210-13 (4th Cir.1998), cert. denied, 525 U.S. 1155, 119 S.Ct. 1061, 143 L.Ed.2d 66 (1999). Thus, it is necessary now to evaluate the underlying claims.

C. The Test For Establishing An Actual Conflict of Interest

[27] To demonstrate that he was deprived of the Sixth Amendment right to conflict-free counsel, Mickens can proceed on one of two theories: (A) that Saunders had a potential conflict of interest that prejudiced his defense, see Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); or (B) that "[1] an actual conflict of interest [2] adversely affected his lawyer's performance" Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). See Enoch v. Gramley, 70 F.3d 1490, 1496 (7th Cir.1995); United States v. Swartz, 975 F.2d 1042, 1047 (4th Cir.1992). Mickens proceeds on the latter theory.

1. Actual Conflict

[28][29] In the context of multiple or simultaneous representations, a lawyer has an actual, as opposed to a potential, conflict of interest when the interest of the petitioner and the other client "diverge[d] with respect to a material factual or legal issue or to a course of action." [FN11] Gilbert v. Moore, 134 F.3d 642, 652 (4th Cir.) (quoting Cuyler v. Sullivan, 446 U.S. 335, 356 n. 3, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) (Marshall, J., concurring in part and dissenting in part)), cert. denied, 119 S.Ct. 103 (1998). It is often difficult to ascertain whether the clients' interests actually diverged in the context of successive representation. Freund v. Butterworth, 165 F.3d 839, 859 (11th Cir.) (en banc), cert. denied, --- U.S. ----, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999); United States v. Tatum, 943 F.2d 370, 376 (4th Cir.1991); United States v. Young, 644 F.2d 1008, 1012 (4th Cir.1981).

> FN11. A potential conflict of interest exists if the interests of the defendant may place the lawyer under inconsistent duties at some time in the future. Cuyler, 446 U.S. at 356, n. 3, 100 S.Ct. 1708.

Keenly aware of the delicate privilege issues which often arise in successive representation cases, the Eleventh Circuit has adopted a refined version of the Cuyler test specifically for that sort of case. See Smith v. White, 815 F.2d 1401, 1406 (11th Cir.1987). [FN12] The test is discussed at length in the Eleventh Circuit's recent decision in Freund v. Butterworth, 165 F.3d 839 (11th Cir.) (en banc), cert. denied, --- U.S. ----, ***603** 120 S.Ct. 57, 145 L.Ed.2d 50 (1999). In Freund, the court held that, in the context of successive representation, a defendant does not demonstrate a disqualifying divergence of interests unless he shows either that "(1) counsel's earlier representation ... was substantially and particularly related to counsel's later representation of petitioner, or (2) counsel actually learned particular confidential information during the prior representation ... that was relevant to petitioner's later case." Freund, 165 F.3d at 859 (internal quotations and citations omitted). "Even proof of both substantial relatedness and confidential information, however, may not necessarily

be enough to demonstrate 'inconsistent interests' in a successive representation case." Id. The situation may require the defendant to introduce, "other proof of inconsistent interests." Id. (quoting Smith, 815 F.2d at 1406).

> FN12. The United States Court of Appeals for the Seventh Circuit has adopted the Smith test for successive representation cases. See Enoch v. Gramley, 70 F.3d 1490, 1496 (7th Cir.1995). This opinion refers to that test as the "Freund test".

The two scenarios described in the Freund test pose the most obvious risks of an actual conflict in the context of successive representation. See United States v. Kliti, 156 F.3d 150, 154 (2d Cir.1998); United States v. Young, 644 F.2d 1008, 1012 (4th Cir.1981). However, neither the Supreme Court nor the Fourth Circuit has restricted proof of a conflict to those two scenarios. See, United States v. Magini, 973 F.2d 261, 263-64 (4th Cir.1992) (directing district court to hold an evidentiary hearing to determine whether client's and lawyer's pecuniary interests diverged). Given the gravity of the charge against Mickens and the somewhat predictable consequence of rejecting his petition, it is imperative that, through "other proof of inconsistent interests," Mickens can carry his burden under the first prong of Cuyler, if the interests actually diverged. In this instance, Mickens argues that Saunders' irreconcilable ethical obligations to Hall and Mickens coupled with Saunders' desire to conceal the successive representation constitute "other proof of inconsistent interests". See infra Sec. VI(D)(2).

2. Adverse Effect

[30] Mickens erroneously contends that an adverse effect can be established simply by showing that "but for the attorney's actual conflict of interest, there is 'a reasonable likelihood that counsel's performance somehow would have been different.' " Stoia v. United States, 22 F.3d 766, 771 (7th Cir.1994) (quoting Frazer v. United States, 18 F.3d 778, 787 (9th Cir.1994) (Beezer, J., concurring)). In fact, a petitioner must demonstrate that counsel's performance was adversely affected by the conflict. Stoia, 22 F.3d at 771 (noting the lapse in counsel's performance must be "contrary to the defendant's interests"). Thus, even though the petitioner is not required to demonstrate prejudice, he must show that the conflict was "deleterious" or "harm[ful]" to counsel's advocacy. See Burger v. Kemp, 483 U.S. 776, 785, 788, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987). A petitioner satisfies the second facet of Cuyler "if the attorney took action on behalf of one client that was necessarily adverse to the defense of the other or failed to take action on behalf of one because it would adversely affect the other." Williams v. French, 146 F.3d 203, 212 (4th Cir.1998), cert. denied, 525 U.S. 1155, 119 S.Ct. 1061, 143 L.Ed.2d 66 (1999).

[31] To prove an adverse effect, a petitioner must satisfy three elements:

> First, he must point to some plausible alternative defense strategy or tactic [that] might have been pursued. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, the petitioner need not show that the defense would necessarily have been successful if the alternative strategy or tactic had been used, rather he only need prove that the alternative possessed sufficient substance to be a viable alternative. Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, he must ***604** establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

Freund, 165 F.3d at 860. Accord Williams, 146 F.3d at 213 (requiring similar elements for demonstrating adverse effect in the context of multiple representation); United States v. Tatum, 943 F.2d 370, 376 (4th Cir.1991).



These basic principles inform the analysis of the conflict of interest claims advanced by Mickens.

D. Proof Of An Actual Conflict

[32] The Freund test, with the modification that Mickens may establish an actual conflict solely through "proof of other inconsistent interests," will be applied to assess the merits of Mickens' claims. At this stage of the analysis, it is insufficient for Mickens merely to suggest what might have animated Saunders' conduct. Mickens must demonstrate, from the state court record and the evidence adduced in these proceedings, that an actual conflict of interest adversely affected Saunders' representation.

Mickens contends that he has proven the existence of actual conflict because: (1) Saunders' representation of Hall was substantially and particularly related to Saunders' later representation of Mickens; (2) Saunders' ethical duty of loyalty to Hall, and Saunders' own self-interest were irreconcilable with his duty to zealously represent Mickens; and (3) Saunders' actually learned particular confidential information during his representation of Hall that was relevant to Mickens' case. See Freund v. Butterworth, 165 F.3d 839, 859 (11th Cir.) (en banc), cert. denied, --- U.S. ---, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999).

1. Substantial Relatedness

[33] Substantial relatedness exists when " 'the present action and the past representation concern the very same subject matter' " or when the prior representation concerned the " 'same criminal transactions' and 'same events' at issue in defendant's case". Freund v. Butterworth, 165 F.3d 839, 864 (11th Cir.) (en banc) (quoting Kraft, Inc. v. Alton Box Board Inc., 659 F.2d 1341, 1345 (1981) and United States v. Martinez, 630 F.2d 361, 362 (5th Cir.1980)), cert. denied, 120 S.Ct. 57, 68 U.S.L.W. 3223 (Oct. 4, 1999). Saunders' representation of Hall was very limited in scope and duration. Specifically, Saunders represented Hall on a concealed weapons charge and an assault on his mother. The representation did not arise out of the "very same subject matter" as the charges facing Mickens. Nor did it involve the same criminal transactions or events. Mickens strains to find a correlation by arguing that the location of Hall's arrest for the concealed weapon charge indicates that he was a prostitute and thus consented to the sexual activity with Mickens. [FN13] (Pet.'s Resp. to Feb. 2 1999 Order at 22.) Hall's arrest, within a mile or so of his residence, even if it was in a high crime area, does not suggest that he was a prostitute, much less that he consented to have sex with Mickens. (5/26/93 Tr. T. at 562; 1/13/99 Hr. T. at 201.) Mickens also contends that "[b]y its very nature the previous representation of the murder victim is substantially related to the defense of the person accused of the murder." (Pet.'s Resp. to Feb. 2, 1999 Order at 13.) The weight of authority refutes that contention. See Crisp v. Duckworth, 743 F.2d 580, 588 (7th Cir.1984) (finding no conflict when defense counsel previously represented murder victim in unrelated criminal action); Kirkpatrick v. Butler, 870 F.2d 276, 284 (5th Cir.1989) (finding no conflict ***605** where defense counsel had friendship with, and had in the past represented, members of murder victim's family); Moseley v. Scully, 908 F.Supp. 1120 (E.D.N.Y.1995) (finding no actual

conflict where counsel previously represented murder victim on unrelated charges); Dixson v. Quarles, 627 F.Supp. 50 (E.D.Mich.) (finding no actual conflict even though defense counsel previously represented the murder victim), aff'd 781 F.2d 534, 535 (6th Cir.1985). Mickens has failed to demonstrate a correlation, much less a substantial and particular relationship, between Saunders' representation of Hall for assault and possession of a concealed weapon and his representation of Mickens on attempted forcible sodomy and capital murder charges.

FN13. Hall was charged with carrying a concealed weapon at 27th and Marshall streets in Newport News. (Probable Cause Statement, United States District Court Clerk's Record # 23.) The arrest warrant for the charge listed Hall's address at 83-28th Street, # D-4, Newport News, Virginia. The evidence does not indicate that the intersection of 27th and Marshal streets was an area frequented by prostitutes.

2. Divergent Ethical Interests

[34][35] Mickens next argues that Saunders' ethical duties, and his desire to conceal the breaches of those duties, left Saunders hopelessly adrift in a fog of torn and conflicting loyalties. See United States v. Tatum, 943 F.2d 370, 377 (4th Cir.1991). Mickens contends that the determination whether there was an actual conflict under the Sixth Amendment is "inextricably intertwined" with an analysis of Saunders' ethical duties and the breach of those duties. Certainly prevailing norms of practice, as reflected in the state codes of professional responsibility, are useful guides for evaluating the ethical obligations of counsel and how a competent lawyer must resolve potential conflicts. See Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). At the threshold, it is now settled that "[t]he effective performance of counsel requires meaningful compliance with the duty of loyalty and the duty to avoid conflict of interests can lead to ineffective representation." Tatum, 943 F.2d at 375. However, the "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." Nix v. Whiteside, 475 U.S. 157, 165, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986); see Lightbourne v. Dugger, 829 F.2d 1012, 1023 n. 12 (11th Cir.1987). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler, 446 U.S. at 350, 100 S.Ct. 1708 (emphasis added).

When Saunders was appointed to represent Mickens in the capital murder of Hall, Saunders was obligated to consider the ethical problems posed by the appointment because Saunders' duty to zealously represent Mickens might be compromised by his loyalty to Hall, including his obligation to preserve Hall's secrets and confidences. See Va.Code Prof'l Responsibility DR 4-101, EC 4-6, Canon 7 (Michie 1992). [FN14] Moreover, even if Saunders did not believe that the representation would ripen into an actual conflict of interest, the choice was not his alone. Id. EC 5-19. Mickens contends that his interests were further compromised by Saunders' attempts to conceal his ethical breaches. However, the evidence shows that, regrettably, Saunders never struggled with the ethical issues envisioned by Mickens. (1/13/99 Hr. Tr. at 220, 228.)

FN14. Under Virginia law, even the fact that there had been juvenile charges against Hall as well as the information in the charging documents arguably constituted confidential information. See Virginia Code Ann. § 16.1-305 (Michie Supp.1992).



To begin, the record here reflects that, as far as Saunders was concerned, his allegiance to Hall, "[e]nded when I walked in the courtroom and they told me he was dead and the case was gone." (1/13/99 Hr. Tr. at 156-7, 218). As Mickens' counsel, Saunders coldly viewed Hall not as former client, but rather as "a demographic situation which was disastrous as far as Mickens was concerned." Id. at 156. That view is remarkably wrong given that Saunders was obligated to preserve any confidence obtained from Hall. Swidler & Berlin v. United States, 524 U.S. 399, 118 S.Ct. 2081, 2086, 141 L.Ed.2d 379 (1998).

***606** However, Saunders testified that his representation of Mickens was not hampered by the duty to preserve Hall's purported confidences. Of course, for purposes of the issue under consideration, the court "accords great weight to a lawyer's perception of a conflict," because it is tasked with evaluating what considerations actually animated Saunders' actions, rather than what obligations should have influenced his actions. United States v. Young, 644 F.2d 1008, 1014 (4th Cir.1981). Thus, whether particular information is confidential under Virginia law while important, is not dispositive of whether Saunders deemed the information to be confidential.

According to Saunders, he did not perceive that his previous representation of Hall presented an actual conflict in representing Mickens. (1/13/99 Hr. T. at 108-11, 214, 223, 228; 12/23/98 Dep. at 86.) That perception was animated by Saunders' conclusion that he did not obtain any confidential information from Hall (1/13/99 Hr. T. at 218-19), and that "[n]othing I knew or did or had anything to do with Mr. Hall had anything to do with [Mickens'] case." Id. at 228. Without condoning the inexcusable failure to disclose the previous representation of Hall, the Court concludes that, as a factual matter, Saunders did not believe that any "continuing duties to [a] former client[ ] [might] interfere with his consideration of all facts and options for his current client." United States v. Tatum, 943 F.2d 370, 376 (4th Cir.1991).

3. Relevant Confidential Information

Although it is inconceivable that Saunders obtained no confidential information from Hall, (1/13/99 Hr. T. at 219), the record here confirms that Saunders did not learn any confidential information from Hall that was relevant to Mickens' defense either on the merits or at sentencing. Freund v. Butterworth, 165 F.3d 839, 865 (11th Cir.) (en banc), cert. denied, --- U.S. ----, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999). Saunders met with Hall on one occasion for a total of fifteen to thirty minutes. (1/13/99 Hr. T. at 98.) Through his representation of Hall, Saunders learned that: (a) Hall had been charged with carrying a concealed weapon at the intersection of 27th Street and Marshall in Newport News; (b) Hall's mother had pressed charges against him for assault, but she was not interested in prosecuting the case (1/13/99 Hr. T. at 155); and (c) Hall was not living with his mother at the time of his death. As discussed fully below, that information was irrelevant to Mickens' defense. [FN15]

FN15. For example, Hall's criminal history might have had some relevance to Mickens' case, if Mickens' testimony had not foreclosed any theory of self-defense.

E. Adverse Effect: The Purported Manifestation of the Conflict

Mickens asserts that Saunders' conflict caused: (1) his failure to raise a consent defense; (2) the failure to investigate or raise any negative information about Hall; (3) the failure to engage in meaningful plea negotiations; and (4) the failure to apprise the sentencing court of Hall's pending charges or his strained relationship with his mother. [FN16] Each of these will be measured against the Freund test for ascertainment of an adverse effect (see p. 603-04 supra ).

FN16. By Order entered February 2, 1999, the Court stated, "[r]eview of the adverse affect prong, for the habeas petition will be limited to instances listed" "in separately numbered paragraphs" in the brief in response to that Order. Accordingly, the Court deems Mickens to have abandoned claims of adverse affect alleged in the initial petition but not realleged in the response to the February 2, 1999 Order.

1. Consent Defense

Mickens asserts that the conflict foreclosed presentation of the defense that Hall was killed during a sexual encounter to which he had consented. That defense, ***607** if successful, would have precluded capital punishment. Mickens points to the following facts that made consent a plausible defense strategy: (a) there were no "defensive" stab wounds; [FN17] (b) there was no evidence that Hall was forced to the secluded area where he was found; (c) there were rumors that Hall was a male prostitute and that the area where Hall's body was found was a known gathering place for homosexuals; (d) there was no blood mixed with Mickens' semen stain on the mattress; and (e) the mattress where Hall's body was found had been used for sexual activity in the past.

FN17. Leah Bush, the medical examiner testified that,

> [d]efense wounds are to areas of the body in a person who sees the injury coming and raises a portion of the body in a protective manner.... Oftentimes, the backs of the arms of or hand or in a case of a sexual or rape-type of assault also present [sic] on the legs if the victim were to raise up their knees to ward off a blow or attack.

(5/26/93 Tr. T. at 510.)

Even if it is assumed that those five facts would have supported a consent defense, the record shows that other facts foreclosed presentation of consent as a plausible alternative defense strategy. First, Saunders knew that there also was evidence that Hall sometimes went to the area where he was murdered simply to watch the water. (1/13/99 Hr. T. at 174, 205; 12/23/98 Dep. at 71.) Second, there were blue marks on Hall's neck which evinced use of a choke hold on Hall, a circumstance inconsistent with consent. (8/20/93 Hr. Tr. at 25; 12/23/98 Dep. at 70.) Third, the bloody transfer stains on the back of Hall's thighs indicated that the attacker stabbed Hall before or during the attempted sexual activity, thereby making consent a rather implausible alternative theory. As Keeling, Mickens' other counsel, remarked, "I would imagine that when the choking of the victim or the stabbing of the victim started happening that [any] consent would have been revoked." (1/13/99 Hr. T. at 33.) Finally, and most importantly, Mickens never suggested that consent was a viable line of defense (12/23/98 Dep. at 67, 68, 73). To the contrary, Mickens repeatedly professed that he had no involvement with Hall in any way. That persistent representation by Mickens encouraged Saunders to conclude that a consent defense did not exist. (1/13/99 Hr. Tr. at 68-70, 77).



Mickens repeatedly informed counsel that he did not even know Hall and that he had nothing to do with the crime. (6/2/93 Tr. T. at 885; 8/20/93 Hr. Tr. at 12, 37; 1/13/99 Hr. Tr. at 77, 89, 135, 183.) And, Mickens insisted on testifying to that effect at his trial and at sentencing. (1/13/99 Hr. Tr. at 69, 224.) Hence, Saunders was compelled to construct a defense that distanced Mickens from Hall and the murder scene. Id. at 77-78, 84. Saunders discarded consent as a strategy not because of any loyalty to Hall, but because neither the facts nor Mickens' testimony was compatible with such a strategy. [FN18] Id. at 68, 156-57, 231. An adverse effect cannot be found where a lawyer relies on what his client has told him and that reliance forecloses a line of defense. See Royal v. Taylor, 188 F.3d 239, 248-49 (4th Cir.1999) (citing Barnes v. Thompson, 58 F.3d 971, 979 (4th Cir.1995)); Parker v. Parratt, 662 F.2d 479, 484 (8th Cir.1981) (concluding defense counsel could not be blamed for offering the defense sworn to by both defendants).

FN18. At the evidentiary hearing, Keeling explained that he never raised the issue of consent with Mickens because Mickens insisted that he was not involved in the crime. (1/13/99 Hr. T. at 68.)

2. Failure to Ascertain and Use Information About Hall

Mickens asserts that an adverse effect of Saunders' conflict is manifest in his failure to investigate and to use negative information about Hall. This alternative defense strategy is based on the premise that negative information about the victim of a crime can be, and often is, used to mitigate the severity of the act of murder.

***608** Of course, adoption of that alternative strategy would have been inconsistent with Mickens' profession of innocence and his purported regret at Hall's passing. "I'll pray each and every day that [Hall] may rest in peace." (6/4/93 Hr. T. at 1090 (sentencing hearing)). Saunders carried that standard during his closing argument, emphasizing the sanctity of human life and expressing regret for Hall's death. (2/7/96 Hr. T. at 479-80; 1/13/99 Hr. T. at 157.) Saunders eschewed an attack on Hall, the young victim of a horrible crime, because it would have appeared disingenuous and would have diminished the value of Mickens' life in the eyes of the jury. (1/13/99 Hr. T. at 112, 156-58; 12/23/98 Dep. at 76, 77).

Mickens' papers do not outline the precise contours of this alternative strategy, but it appears to be based on the premise that investigation would have shown that Hall was a neer-do-well, male prostitute who had been charged with carrying a weapon and assaulting his own mother. However, the record offers no support for the existence of evidence which would have made that strategy either plausible or viable. Even diligent investigation by federal habeas counsel has uncovered nothing but rumor about Hall's supposed life as a male prostitute. But, even if that could have been proved, evidence on that point would be useful only by mounting a consent defense which was foreclosed by Mickens' insistance that he did not even know Hall or by pointing to another perpetrator, for which there was no admissible support either. The propensity of that approach to backfire made it an unreasonable alternate strategy or tactic at sentencing.

The evidence that Hall had been charged with carrying a weapon had no utility as an alternate strategy, even if it were admissible (which is highly doubtful). The evidence that Hall had been charged with assaulting his mother would have been useful insofar as it could be argued to discredit the mother's

professions of grief tendered to the probation officer for inclusion in the victim impact statement. Of course, that approach was fought with the risk of unintended consequences as well. In any event, even though admissible for impeachment, evidence on that point cannot be considered to present a plausible or viable alternate strategy because the assault was of a relatively minor nature and its impeaching effect would be de minimus.

Even if the negative information about Hall could be considered as raising a plausible, viable strategy, the record here dispels the contention that the failure to use negative information about Hall is attributable to any conflict of interest on the part of Saunders. This is particularly evident in the conduct of Saunders' co-counsel, Warren Keeling, who was in charge of the sentencing phase of Mickens' trial. (1/13/99 Hr. T. at 78.) In preparation for the trial, Keeling read the newspaper article, (Pet.Ex. 1, attached to initial federal petition), which reported that Hall had been charged with assaulting his mother; that the police had "picked him up" carrying a weapon; that Hall had been kicked out of his mother's house; and that a social worker was involved in Hall's life. (1/13/99 Hr. T. at 61.) At the time, Keeling was looking for evidence about Hall that could be used at Mickens' sentencing. Id. at 57. Keeling did not deem any of the information reported in the newspaper article to be relevant to that end because he did not pursue it. See Freund v. Butterworth, 165 F.3d 839, 868 (11th Cir.) (en banc) (noting counsel's representation was not tainted by conflict, since conflict-free counsel would have chosen the same defense), cert. denied, --- U.S. ----, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999). Here, Keeling, who is free of conflict, followed the same course as that taken by Saunders.

3. Plea Negotiations

Another plausible alternative strategy would be a plea of guilty with a sentence other than death. And, that certainly would have been a reasonable alternative ***609** under the facts. However, the absence of plea negotiations was attributable to the decision of the Commonwealth's Attorney who advised that there was "[n]o way" he would allow a plea in the case. (1/13/99 Tr. T. at 158; 12/23/98 Dep. at 80-81.) There is nothing in the record to suggest that the plea negotiations were not pursued because Saunders previously had represented Hall. Of course, it is possible that evidence of a consensual encounter or adverse information about Hall might have prompted a willingness to negotiate, but, as explained above, the record discloses that strategies based on those concepts were neither plausible nor viable.

4. Failure to Apprise the Sentencing Court of Hall's Pending Charges and Hall's Strained Relationship With His Mother

After the second jury had fixed Mickens' sentence at death, but before the formal imposition of the sentence of death, a post-sentence report was prepared for the judge who ultimately sentenced Mickens to death. See Va.Code Ann 19.264.5 (Michie 1990). That report contained the following information:

> The victim's mother stated as a result of this offense, her marriage broke up. She stated also the offense shattered her world. She stated "all I lived for was that boy." As a result of the offense, the victim's mother stated she dropped out of school, she lost the potential of a good income, that her daughter became depressed for six months, and her husband went into the hospital for six months one month after Timothy died. She (mother) was left to deal with both her daughter's depression and her husband's illness.
>
> The victim's mother stated "I'll never be over the way my son was killed."



(Circuit Court for the City of Newport News, Clerk's Record, Post-sentence Report prepared 3/6/96.)

Mickens argues that Saunders could have used information gleaned from his representation of Hall to rebut the mother's statements that she was overwrought at the death of her son, but that his previous representation of Hall kept that attack on Hall's mother out of the sentencing proceeding. Mickens has not established that, in the context of the sentencing hearing required by Va.Code Ann. § 19.2-264.5 hearing, a tactic of that sort "possessed sufficient substance to be a viable alternative." Freund v. Butterworth, 165 F.3d 839, 860 (11th Cir.) (en banc), cert. denied, --- U.S. ----, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999).

Under Va.Code Ann. § 19.2-264.5, when a jury has fixed a defendant's punishment at death, the trial court, before imposing sentence, must require a thorough investigation by a probation officer into the defendant's history and background so that the court "may be fully advised as to whether the sentence of death is appropriate and just." After considering the report, the court, "upon good cause shown," may set aside the death sentence and impose a sentence of life imprisonment. Id. The Supreme Court of Virginia has emphasized that, in recommending death, "the jury's verdict is not merely a recommendation to be followed or rejected by the trial court at its discretion." Frye v. Commonwealth 231 Va. 370, 345 S.E.2d 267, 286 (1986). Although the Supreme Court of Virginia has not posited a concise definition of what constitutes "good cause" in the capital sentencing context, the Court's consistent refusal to find good cause attests to the exacting nature of the standard. See Hedrick v. Commonwealth, 257 Va. 328, 513 S.E.2d 634, 641 (1999); Roach v. Commonwealth, 251 Va. 324, 468 S.E.2d 98, 113 (1996); Chandler v. Commonwealth, 249 Va. 270, 455 S.E.2d 219, 226-27 (1995); Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422, 438 (1985); Bunch v. Commonwealth, 225 Va. 423, 304 S.E.2d 271, 285 (1983).

Considering the difficulty of showing good cause under Virginia law and considering ***610** that Mickens has failed to show how impeaching Hall's mother's assertions of grief would have furthered a finding of good cause, it cannot be said that the tactic, if employed, would have met the test of viability. And, in any event, the tactic was inconsistent with Mickens' expressions of regret for the pain that Hall's death caused his mother. (3/29/96 Hr. T. at 22).

Thus, Mickens has failed to show that the purported conflict resulted in Saunders foregoing a plausible alternate strategy or tactic that was reasonable under the facts. And, perhaps more importantly, even if it is assumed that there was a plausible, viable alternate strategy that Saunders failed to pursue, the record shows no link between the failure to pursue it and the asserted conflict.

F. Adverse Effect: General

Wholly apart from the question of alternate strategies foresworn, Mickens raises two other reasons why the conflict adversely affected Saunders' representation. First, Mickens contends that Saunders' investigation was deficient. Second, Mickens argues that the failure of Saunders to pass along information to his co-counsel, Warren Keeling, was per se an adverse effect. Those contentions will be considered next.

1. Deficient Investigation

Mickens asserts that, but for the conflict, Saunders would have reviewed Hall's

juvenile file and would have pursued leads provided to the police by Bernard Gordon, Alicia Thrash, and Charity Fleming. According to Mickens, had these basic tasks been performed, Saunders would have uncovered evidence useful for his defense.

Saunders testified that he never considered reviewing Hall's juvenile file because he believed that file did not contain any information pertinent to Mickens' case. That, of course, misses the point because a reasonable investigation would have included an examination of Hall's past, including his JDR Court file (assuming that could had been accomplished under state law). Moreover, without reviewing the file, Saunders' view on that topic is speculative. But, the Court's review of Hall's juvenile file confirms that, on that score, Saunders' guess was a correct one.

The explanation given by Saunders for not pursuing the information contained in the police files because to do so would have been a waste of time is not so readily dispatched. Saunders says that he reviewed the police files and took notes of their contents. Those notes reflect that Bernard Gordon (the father of the family with whom Hall lived at the time of his death) told the police that "nothing much else of use--except that Tim [Hall] had been ducking three guys [he] owed money to for about three months. They came to the apartment at least once." (Pet.'s Ex. 2B at 1/13/99 Hr. T. at 127.) Those notes, of course, present the prospect that Hall's creditors might have killed him. Saunders testified that he intended to talk to Gordon, but that Gordon died before Saunders was able to interview him. (1/13/99 Hr. T. at 128.) Although Gordon might have provided information suggestive of another perpetrator, the failure to secure his knowledge before he died was not attributable to a conflict. That, however, does not explain why Saunders did not pursue the same lead from other sources. The lead should have been pursued because, given Mickens' position that he did not know Hall, the lead suggested that there might have been evidence of an alternate perpetrator. The record discloses no reason for the failure to follow that lead other than Saunders' lack of perspicacity or perhaps indolence. Neither of those reasons bespeaks that he failed to act because of his previous representation of Hall.

Next, Mickens faults Saunders for failing to pursue information which Alicia Thrash and Charity Fleming provided to the police which, according to Mickens, suggested that Hall was being harassed by ***611** a male prostitute on the night of the murder. (P.'s Resp. to Feb. 2, 1999 Order at 29.) Evidence of that sort also might have allowed counsel to argue the existence of another perpetrator. Alicia Thrash was Hall's friend and Hall intended to attend Thrash's sixteenth birthday party on the night that he was murdered (Saturday, March 28, 1992). After Hall was murdered, Thrash spoke to "Stephanie," Hall's ex-girlfriend. Stephanie told Thrash that she had talked to Hall on the night of his death. Saunders' notes reflect that on April 10, 1992, Thrash provided the following statement to the police:

> Everything got real messed up cause when we went to the wake [for Hall], this girl named Stephanie said Timmy [Hall] had called her Saturday night, all scared and nervous, talking about this prostitute was harassing him, saying all kinds of stuff, that he was harassing him over something or other, & then she told him to come pick her up, and he said that he was at the end of 29th Street, that is where he said by the construction office, that's where he was at. & she said he called her & told her to come pick him up like that.

(Pet.'s Ex. 2A at 1/13/99 Hr. Tr. at 124-25.) That information, of course, presented the possibility that Hall was killed in a dispute with a male prostitute.

On the other hand, Saunders also had access to Charity Fleming's statement to the police which indicated that Thrash's secondhand account of the events was less than reliable. According to Saunders' notes, Fleming "supposedly talked to Tim [Hall] on Sunday around 6-7 and wanted her or Stephanie (Ex-girlfriend) to pick him up at 29th St either on [the] corner or at Basic [Construction] because of problems he was having with a girl he picked up on Washington Ave. [a] couple of days before. (this could be just Bull/ or she could have the day wrong)." (Pet.'s Ex. 2B 1/13/99 Hr. T. at 127-28) (emphasis added). Fleming's account of the conversation indicates that Hall's request for a ride came on Sunday (the day after Hall's death) and was prompted by trouble that Hall was having with a girl, not a male prostitute.

Both Thrash and Fleming offered leads which may have made it more difficult for the Commonwealth to prove that Mickens was the murderer because they pointed to an alternate killer. However, Saunders' rejected the Thrash/Fleming lead because he did not believe that the lead was credible (12/23/98 Dep. at 52-54) for the reason that Fleming said that she spoke to Hall on Sunday, the day after Hall was killed. At the same time, Saunders concluded that the Thrash/Fleming lead pointed to an angry female as the perpetrator (1/13/99 Hr. T. at 131-32), and, therefore, concluded, in light of the overtly homosexual nature of the crime, that none of the leads suggested by Gordon, Thrash or Fleming could identify a viable alternative perpetrator of the crime. [FN19] Id. Those reasons for refusing to pursue evidence which pointed to the existence of an alternative perpetrator are not defensible, especially where, as here, a client's life is on the line. Additionally, Fleming's assertion that Hall was still alive on Sunday was hardly inconsequential to Mickens' defense considering that the Commonwealth's Attorney conceded, at Mickens' preliminary hearing, that it was not "going to be able to determine the precise date that this homicide took place." (P.'s Ex. 5 from Federal Evidentiary Hearing, at 59.). Evidence of that sort could have helped to undermine the relevance of the testimony of Vincent West and Bruce Mitchell that Mickens was lurking around the area where Hall was murdered on Saturday night.

> FN19. Saunders spoke to Thrash over the telephone, but did not question her regarding her statement about a prostitute harassing Hall. (1/13/99 Hr. T. at 242-43.)

However, Mickens must do more than show that Saunders could, or should, have pursued a promising lead. He must also establish some link between the asserted actual conflict and the decision to forego ***612** further investigation of the lead. See Freund v. Butterworth, 165 F.3d 839, 860, 869 (11th Cir.) (en banc), cert. denied, --- U.S. ----, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999); Wilson v. Moore, 178 F.3d 266, 281 (4th Cir.1999); Stoia v. United States, 109 F.3d 392, 397 (1997) (rejecting conflict claim where petitioner "failed to show the connection between any actual conflict of interest and any adverse effect on" petitioner's defense). In other words, Mickens has "the burden of proving through a preponderance of the evidence" that Saunders "would have" pursued the Thrash and Fleming leads "but for" Saunders' professional relationship with Hall. Freund, 165 F.3d at 869. Mickens may carry this burden by showing that pursuit of these leads "was inherently in conflict with" Saunders' "other loyalties or interests" or by other probative evidence that he did not pursue the leads because of those interests. Id. at 860. This, he has failed to do.

In sum, there is an absence of convincing

evidence connecting the Thrash and Fleming leads with Saunders representation of Hall. There is no suggestion that Thrash, Fleming or Stephanie, Hall's ex-girlfriend, were involved, even tangentially, in the concealed weapons and assault charges as to which Saunders served as counsel to Hall. Nor has Mickens produced any plausible evidence that, during his representation of Hall, Saunders suspected that Hall was involved in prostitution.

When all is said, the Court credits Saunders' testimony that he did not refrain from taking any actions for Mickens because of his earlier representation of Hall. (1/13/99 Hr. T. at 219, 240-41); Freund, 165 F.3d at 869. And, Mickens has failed to show that pursuit of the Thrash and Fleming leads was inherently in conflict with, or was not undertaken because of, Saunders' loyalty to Hall or because of Saunders' own interests.

2. Saunders' Failure to Advise Keeling of Information About Hall

While it certainly is reasonable (and expected) that counsel would share with co-counsel that he previously had represented the victim, it is undisputed that Saunders never told Keeling about his previous representation of Hall. [FN20] Mickens asserts that Saunders failed to share the fact of his representation of Hall and whatever information that he had about Hall because Saunders feared that his conflict would be discovered and that he would be removed as Mickens' counsel in the capital case, thereby forfeiting the prestige and financial benefits which are associated with serving as counsel in this case.

> FN20. According to Saunders, he assumed that Keeling (and everyone else) knew that he had represented Hall. (1/13/99 Hr. T. at 105.) That assertion lacks evidentiary support and, considering the secrecy attached to juvenile proceedings and a lawyer's obligations of confidentiality, the explanation borders on the absurd. Indeed, Saunders could not recall mentioning to anyone, at the time he represented Mickens, that he had previously represented Hall. Id. at 107.

Virginia's scheme for compensating lawyers in capital cases, parsimonious as it is, does not support a finding that Saunders was motivated by financial gain. And, although some publicity, and hence some prospect of luring clients, often attends representation of a client in a notorious case, the record does not disclose that Mickens' case was of that ilk, notwithstanding that, like most murders, substantial publicity surrounded it.

After viewing Saunders' testimony, the Court is unconvinced that such selfish "loyalties or interests" existed, much less motivated Saunders' silence. (1/13/99 Hr. T. at 93, 102-4). Rather, this lapse of communication is attributable to Saunders' myopic view of the potential conflicts and utter insensitivity to the ethical issues raised by the facts. (Id. at 95, 108- 11, 220, 227-28.) Saunders did not believe the Hall representation was a source of relevant information or potential conflicts for the Mickens case. Thus, as far as he was ***613** concerned, his perception ended the matter for all concerned: his client, the court and co-counsel. The record does not demonstrate that Saunders' silence, albeit inexcusable, was attributable to Saunders' self-interest. See Williams v. French, 146 F.3d 203, 212-13 (4th Cir.1998), cert. denied, 525 U.S. 1155, 119 S.Ct. 1061, 143 L.Ed.2d 66 (1999).

VII. FAILURE OF THE COURT TO CONDUCT AN INQUIRY INTO THE PURPORTED CONFLICT



As a separate, but related ground of relief, Mickens contends, relying on Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), that he is entitled to a new trial because JDR Court Judge Foster removed Hall's criminal case from the docket, and shortly thereafter, without conducting any inquiry, appointed Saunders to represent Mickens on the charges arising out of Hall's murder. In Wood, the Supreme Court sua sponte raised an attorney conflict of interest claim. The Court concluded that "the possibility of conflict was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further." Id. at 272, 101 S.Ct. 1097 (emphasis added). However, the Court could not be sure whether counsel was adversely affected by a conflict. Consequently, the Court remanded the case for a hearing to determine whether an actual conflict existed and, if so, whether the right to independent counsel had been waived. Id. at 273-74, 101 S.Ct. 1097.

Mickens cites a footnote in Wood for the proposition that the absence of any inquiry by Judge Foster requires the reversal of his conviction. That footnote reads:

> Justice White's dissent states that we have gone beyond the recent decision in Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Yet nothing in that case rules out the raising of a conflict-of-interest problem that is apparent in the record. Moreover, Sullivan mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' Id. at 347, 100 S.Ct. 1708

Wood, 450 U.S. at 272 n. 18, 101 S.Ct. 1097 (emphasis in original).

[36][37] The Commonwealth responds that the JDR Court did not try Mickens and thus is not the "trial court" charged with a duty to inquire under Wood. That argument, however, is not grounded on authority which supports the proposition that only the court that actually tries the defendant is charged with making such an inquiry. Rather, precedent and common sense dictate that the duty to inquire into apparent conflicts arises before the case winds its way to the particular court and judge tasked with conducting the defendant's trial. See Holloway v. Arkansas, 435 U.S. 475, 489-90, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (emphasizing the importance of conflict free counsel in pretrial proceedings, including plea negotiations); Wilson v. Morris, 527 F.Supp. 422 (C.D.Ill.1981) (concluding that the preliminary examination judge is charged with making inquiry when apprised of particular conflict) rev'd on other grounds, 724 F.2d 591 (7th Cir.1984) (en banc) (however that court's duty to perceive the conflict is qualified by its limited role); Cf. Carter v. Commonwealth, 11 Va.App. 569, 400 S.E.2d 540, 543 (1991) (reversing conviction for court's failure to initiate Wood inquiry when probable risk of conflict was brought to its attention during pre-trial proceedings). Thus, the duty to inquire into particular conflicts extends to the JDR Court in this instance because it appointed Mickens' counsel.

Moreover, the record before Judge Foster presented special circumstances of an apparent possible conflict which required judicial inquiry. On Friday, April 3, 1992, Judge Foster removed the assault and concealed weapons charges against Hall from the docket, noting that the defendant was deceased. (Commonwealth v. Hall, No. J.40845-2, 3, (Newport News JDR ***614** Court Apr. 3, 1992.)) Judge Foster's handwritten order dismissing the charges was entered directly upon the individual docket for Hall's juvenile charges. That docket entry consisted of a single page which set forth Hall's full name, date of birth, an abbreviated history of the proceedings, the

charges, and the identity of his appointed attorney, Bryan Saunders. Id. Judge Foster entered the order removing Hall's case from the docket before the case was called. (1/13/99 Hr. T. at 96-97.) And, Saunders testified that he learned from some unidentified person (either in the courthouse or in the courtroom) that the charges against Hall had been dismissed because Hall was dead. Id. at 96-97, 218. There was no evidence that Saunders appeared before Judge Foster on the date that the charges against Hall were dismissed, Friday, April 3, 1992.

[38] However, on Monday, April 6, 1992, the next business day, Judge Foster appointed Saunders to represent Mickens in the capital murder of Hall. (Newport News Circuit Court Record at 5.) Mickens' arrest warrants, which appear to have been before Judge Foster when she appointed Saunders, charged that "on or about March 30, 1992" Mickens murdered "Timothy Jason Hall, white male, age 17, by stabbing, and during the commission of an abduction, and sodomy as well as robbery". Id. at 4. At that time, Judge Foster knew, or should have know, that Saunders was being appointed to represent Mickens on charges of murdering the juvenile Saunders recently represented.

Certainly, on Monday, April 6, 1992, Judge Foster connected, or had the capacity to connect, the juvenile, capital murder victim, Timothy Jason Hall with the deceased juvenile defendant whose case she had removed from her docket the previous Friday. The heinous nature of the crime and the publicity it received make it difficult to accept that the connection would have escaped Judge Foster's notice. (1/13/99 Hr. T. at 36.) In selecting counsel for Mickens, the judge was no doubt aware that Mickens faced charges as to which it might be necessary to counter "evidence about the victim and about the impact of the murder on the victim's family", at least at the penalty phase of the case. See Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). In light of that prospect, Judge Foster should have recognized the potential conflict in appointing the attorney who represented the victim on criminal charges at the time of his death, to represent the capital defendant at sentencing. The failure to do so was error under Wood. [FN21]

> FN21. Then, on July 17, 1992, Judge Foster conducted the preliminary hearing on the charges against Mickens. (Newport News Circuit Court Clerk's Record at 2 and 4.) At that hearing, the Commonwealth presented twelve witnesses and more than one hundred pages of testimony in support of its case. (P.'s Ex. 5 from 1/13/99 Hr.) That evidence afforded Judge Foster with an overview of the known circumstances surrounding Hall's death. At the conclusion of the Commonwealth's evidence, Judge Foster found probable cause to certify a charge of attempted forcible sodomy and capital murder during the commission of attempted forcible sodomy to the grand jury. Id. at 130. Judge Foster found no probable cause on the charges of abduction with intent to defile and robbery.

However, just as in Wood, the failure to inquire into a possible conflict does not require reversal. Wood v. Georgia, 450 U.S. 261, 273-74, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). Properly understood, the trial court's duty to inquire into known or obvious conflicts of interest "is a reflection of the fact that absent an inquiry, the record will demonstrate that a particular conflict existed in violation of the Sixth Amendment. Unless a judicial inquiry rebuts the



conclusion otherwise compelled by the circumstances, relief must be granted." Wilson v. Morris, 724 F.2d 591, 594 (7th Cir.1984) (en banc). Thus, where, as here, further judicial inquiry reveals that potential conflict never ripened into an actual conflict, the petitioner is entitled to no relief. See United States v. Young, 644 F.2d 1008, 1013 (4th Cir.1981) (remanding for an inquiry into whether an actual conflict***615** existed in successive representation), appeal after remand, 677 F.2d 381, 383 (4th Cir.1982). See also Garcia v. Bunnell, 33 F.3d 1193, 1199 (9th Cir.1994); Boysaw v. Deans, No. 89-7794, 935 F.2d 267, 1991 WL 89923, at *5 n. 1 (4th Cir. May 31, 1991); Sutton v. Murray, No. 88-7192, 881 F.2d 1070, 1989 WL 87660 at *1 (4th Cir. Aug.1, 1989); Wilson v. Morris, 724 F.2d 591, 594 (7th Cir.1984) (en banc); United States v. Winkle, 722 F.2d 605, 611- 612 (10th Cir.1983); Brien v. United States, 695 F.2d 10, 15 n. 10 (1st Cir.1982); United States v. Green, 680 F.2d 183, 191-92 n. 12 (D.C.Cir.1982); Cox v. Norris, 958 F.Supp. 411, 418 (E.D.Ark.1996); Bonin v. Vasquez, 807 F.Supp. 589, 606 (C.D.Cal.1992); In Re Richardson, 100 Wash.2d 669, 675 P.2d 209, 215 (1983). But see Ciak v. United States, 59 F.3d 296, 302 (2d Cir.1995) (applying automatic reversal rule).

Judge Foster was not relieved of her duty to inquire into the apparent possible conflict presented here simply because Mickens' trial was to be conducted in another court or because some of her chargeable knowledge stemmed from a separate criminal matter. However, the "mere possibility of a conflict is insufficient to impugn a criminal conviction." Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). As explained elsewhere in the opinion, the possible conflict of interest presented by Saunders' successive representation of Hall and Mickens never ripened into an actual conflict nor was Saunders' advocacy impaired thereby. Thus, Mickens has not shown that the shortcomings of court and counsel alleged in Claims 5 and 6 "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) (describing standard for establishing prejudice sufficient to excuse a procedural default). For the foregoing reasons, Claims 5 and 6 will be dismissed.

## VIII. CONCLUSION

As Mickens so vigorously contends, Saunders conducted himself unwisely, and in derogation of his ethical duties, in successively representing Hall and his murderer without ever bringing such representation to the attention of the court or Mickens. And, the Newport News JDR Court was on notice of sufficient facts about the relationship between Hall and Saunders that it should not have appointed Saunders to represent Mickens without a full inquiry and without apprising Mickens of the potential conflict. However, that representation did not violate Mickens' constitutional rights.

Claims 1, 2 and 4 are dismissed on the merits. Claims 3 and 5 through 12 are procedurally defaulted. Mickens has not attempted to excuse his default of Claim 3, accordingly that Claim is dismissed. With respect to Claims 5 and 6, Mickens has demonstrated cause, but not prejudice, thus, Claims 5 and 6 will be dismissed. Finally, Mickens has failed to show cause, or a fundamental miscarriage of justice to excuse his default of his remaining claims, thus Claims 7 through 12 are dismissed. The petition for a writ of habeas corpus is denied. The action is dismissed.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of

record.

It is so ORDERED.

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby ORDERED that:

1. Claims 1, 2 and 4 are dismissed on the merits.
2. Claims 3 and 5 through 12 are procedurally defaulted and dismissed.
3. The petition for a writ of habeas corpus is denied.
4. The action is dismissed.

Mickens may appeal the decision of the Court. Should Mickens wish to do so, ***616** written notice of appeal must be filed with the Clerk of the Court within thirty (30) days of the date of entry hereof. Failure to file a timely notice of appeal may result in the loss of the right to appeal.

It is so ORDERED.

END OF DOCUMENT



*VIRGINIA:*

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Monday *the* 15th *day of* December, 1997.

Walter Mickens, Jr., No. 212431, Petitioner.

- against Record No. 971669

Warden of the Mecklenburg Correctional Center, et al., Respondents

Upon a Petition for a Writ of Habeas Corpus

Applying the rule in Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), to petitioner's allegations 3, 6, 7, 8, 10, 11, 12 and 14; the rule in Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970), to petitioner's allegations 1, 2, 4, 5, 9 and 13; and finding no merit in petitioner's allegations of ineffective assistance of counsel, the Court is of opinion that the writ of habeas corpus should not issue as prayed for. It is therefore ordered that the said petition be dismissed.

A Copy,

Teste:

David B. Beach, Clerk

By: Patricia M. Harris
Deputy Clerk

Was [illegible] filed

# OPPOSITION BRIEF

## QUESTIONS PRESENTED

I. Should this Court grant a stay of execution and writ of certiorari to review the en banc Fourth Circuit decision denying federal habeas corpus relief on Mickens' claim that a state juvenile court judge should have known of, and inquired into, a possible conflict of interest because Mickens was represented by an attorney who previously represented Mickens' murder victim on minor juvenile charges, despite the fact that:

(1) the claim was defaulted and Mickens failed to demonstrate prejudice from the default;

(2) the district court conducted an evidentiary hearing and made unchallenged findings of fact that there was no "actual conflict of interest;"

(3) the en banc Fourth Circuit correctly held that petitioner must demonstrate an actual conflict of interest adversely affecting counsel's representation;

(4) petitioner failed to demonstrate that the state juvenile judge had sufficient notice of a "particular conflict," and does not contest the fact that the trial court had no knowledge suggesting a conflict; and

(5) the decision below is not in conflict with the decisions of those federal and state courts of appeal that follow Wood v. Georgia, 450 U.S. 261 (1981)?

II. Should this Court grant a stay of execution and certiorari to review the en banc Fourth Circuit's unremarkable requirement than an adverse effect has to be linked to the alleged conflict of interest, which rule is in accord with precedent from this Court and the various courts of appeals?

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## STATEMENT OF THE CASE

### *A. Prior Proceedings*

Mickens was convicted in a jury trial in the Newport News Circuit Court in 1993 of the capital murder of 17 year old Timothy Jason Hall in the commission of an attempted forcible sodomy, and was sentenced to death. The Virginia Supreme Court affirmed Mickens' convictions and death sentence, Mickens v. Commonwealth (Mickens I), 442 S.E.2d 678 (Va. 1994), but this Court remanded the case to the state court following the decision in Simmons v. South Carolina, 512 U.S. 154 (1994), see Mickens v. Virginia, 513 U.S. 922 (1994), and the Virginia Supreme Court ordered a new sentencing hearing. Mickens v. Commonwealth (Mickens II), 457 S.E.2d 9 (Va. 1995).

A second jury again sentenced Mickens to death in February 1996. The sentence was affirmed on direct appeal. Mickens v. Commonwealth (Mickens III), 478 S.E.2d 302 (Va. 1996), cert. denied, 520 U.S. 1269 (1997). After unsuccessfully pursuing state habeas corpus relief, Mickens filed his federal habeas petition in the district court in June 1998, for the first time raising a claim that one of his court-appointed trial counsel had a conflict of interest because he previously had represented the victim of Mickens' capital crime.

Notwithstanding Mickens' state court default, the district court appointed an investigator, ordered extensive discovery and held an evidentiary hearing in January 1999. On November 5, 1999, the district court ordered the petition dismissed, finding that the potential conflict of interest never ripened into an actual conflict and did not impair counsel's advocacy on behalf of Mickens. Mickens v. Greene, 74 F. Supp. 2d 586, 615 (E.D. Va. 1999).

Mickens appealed and, on September 14, 2000, a divided panel of the United States Court of Appeals for the Fourth Circuit reversed, directing the district court to grant the writ because, in contradiction of the district court's factual findings, the panel majority believed "Mickens' lead trial counsel had a conflict of interest that the judge appointing counsel failed to look into." Mickens v. Taylor, 227 F.3d 203, 218 (4th Cir. 2000). On October 20, 2000, the Fourth Circuit granted rehearing *en banc*. On February 16, 2001, the *en banc* Fourth Circuit affirmed the denial of federal habeas corpus relief in a 7-3 decision, concluding that Mickens had failed to demonstrate that the alleged conflict of interest adversely affected counsel's performance. Mickens v. Taylor, 240 F.3d 348 (4th Cir. 2001) (*en banc*). On March 13, 2001, the Fourth Circuit denied Mickens' petition for rehearing of the rehearing *en banc*.

On March 2, 2001, pursuant to Virginia Code § 53.1-232.1, the Newport News Circuit Court set Mickens' execution for April 17, 2001. Mickens' motion for a stay of execution was denied by the Fourth Circuit on March 26, 2001. Mickens v. Taylor, ___ F.3d ___ (4th Cir. 2001) (*en banc*).

### *B. The Facts of the Crimes*

The Virginia Supreme Court found the facts of Mickens' crimes as follows:

> On March 28, 1992, Timothy Jason Hall, age 17, resided with 14-year-old Raheem Gordon and Gordon's father in an apartment located at 28th and Washington Streets in the City of Newport News. Hall and Gordon were roommates, and they often exchanged clothes, including shoes.
>
> That day, between 7:00 and 8:00 p.m., Hall gave Gordon a ride, in Hall's automobile, to a party at the nearby Towers apartment building. At the time, Hall was wearing a pair of Gordon's Nike brand "Cross Trainer" tennis shoes. He also was wearing blue jeans and a shirt imprinted with either the word, "Duke," or the words, "Miami Hurricanes." Hall had intended to return to the party, but he never did. Neither Gordon nor his father ever saw Hall after that evening.
>
> Vincent West and Bruce Mitchell also attended the party. About 8:00 p.m., they left the party and went to a nearby convenience store. After purchasing a few items and leaving the store, they sat in a park adjacent to the Towers apartment building. While sitting there, West and Mitchell saw a man with a bicycle, hiding in some bushes and looking at them. The man later was identified as the defendant, Mickens.

The following day, Gordon saw Hall's automobile. It was parked on West Avenue, near 28th Street, close to the Towers apartment building and in the same place it had been parked the previous night.

On March 30, 1992, about 12:30 p.m., Chris Basford was walking along the James River between 25th and 30th Streets when he saw a body beneath an abandoned construction company building. The body of a male Caucasian was lying face down on a mattress under a sheet of plywood. The body was nude from the waist down, except for white athletic socks, and its legs were spread apart approximately 12 inches. The victim was identified as Timothy Jason Hall.

Pubic hairs were recovered from the victim's buttocks. Bloody "transfer" stains were evident on the outsides of the victim's thighs, and a white liquid substance was observed close to the victim's anus. Cigarette butts lying near the mattress also were recovered, and the mattress cover was seized for scientific examination. Nearby, the police found a pair of men's blue jeans and white underwear shorts that had washed up in the surf of the river. Gordon identified the clothes as those worn by Hall on the evening of March 28, 1992.

An autopsy revealed 143 separate "sharp force injuries" to the victim's body. Of the injuries, 62 were paired stab injuries that could have been caused by a multiple-blade knife, 13 were single stab wounds, and three were paired incised wounds.

The medical examiner who performed the autopsy concluded that the victim had bled to death and that 25 of the 143 wounds were fatal. The fatal wounds included four pairs of stab wounds that punctured the right lung, three single stab wounds that punctured the left lung, seven stab wounds to the skull that penetrated the brain, a stab wound to the forehead that also penetrated the brain, one pair of stab wounds that perforated the liver, and a pair of stab wounds to the right neck that severed the carotid artery and the jugular vein.

The medical examiner opined that the fatal wounds may not have caused instant death. Instead, she estimated that the victim could have lived as long as 30 to 40 minutes after infliction of the last wound and that, during this time, the victim may have been conscious.

On the evening of April 4, 1992, the police were informed that a black male, wearing a blue and white jacket and riding a bicycle, had assaulted a juvenile. Responding to this information, Police Officer D. A. Seals and Detective Dallas Mitchell found Mickens riding a bicycle in the parking area of the abandoned construction company building.

Seals exited the police car, displayed his badge, and approached Mickens. Mickens, thereupon, fled on his bicycle. Shortly thereafter, Seals and Mitchell again came



upon Mickens as he was being detained by other police officers. Mickens was arrested at 7:00 p.m. on the charges involving the juvenile.

Mickens agreed to talk with the police after being advised of his Miranda rights. Officer Mitchell told Mickens that he knew Mickens had killed Hall, but the officer did not tell Mickens how Hall had been murdered. In denying involvement in Hall's murder, Mickens said, "You didn't find any knife on me; did you?"

The following morning, warrants were obtained charging Mickens with Hall's murder and attempted sodomy. When Officer Seals handed Mickens copies of the warrants, Mickens said, "I accept the warrants, I accept the charges." Seals asked Mickens what was meant by that statement, and Mickens responded, "Mother f____r, if I told you I accept the warrants that means I'm guilty, don't it?"

On April 7, 1992, the police found Michael Jacobs wearing the Nike brand "Cross Trainer" tennis shoes that Hall had been wearing when Gordon had last seen Hall alive. Jacobs told the police that he had bought the shoes from Mickens for $5.00 the previous week.

An examination of the pubic hairs removed from Hall's buttocks revealed that they were from an African-American and were alike in "all identifiable microscopic characteristics" to the pubic hair sample taken from Mickens. The expert who examined the hairs further testified that the hairs could not have originated from Hall because he was a Caucasian. The witness also stated that tissue was attached at the roots of the hairs, indicating the hairs had been forcibly removed, possibly by the rubbing of the genitals against Hall's buttocks.

An examination of a stain found on the mattress cover revealed human sperm. Through DNA analysis (RFLP type) of the sperm and of blood samples taken from Hall and Mickens, the expert determined that Hall could not have produced the stain. The expert determined further that Mickens' DNA pattern matched the DNA pattern in the stain on the mattress cover. The witness also stated that the approximate percentages of the population that could have deposited the stain was one in 27,000 Caucasians, one in 6,000 African-Americans, and one in 2,000 Hispanics.

The cigarette butts and certain other hairs recovered at the crime scene also were subjected to DNA analysis (PCR type). Both Hall and Mickens had D.Q. Alpha type 1.2, 4. The expert making the comparisons determined that Mickens could not be eliminated as the source of the hairs and of the saliva on the cigarette butts. Mickens smoked cigarettes, and Hall was never known to smoke cigarettes.

Tyrone Brister testified that, when he and Mickens shared a holding cell at the courthouse on March 26, 1993, he asked Mickens why he was in the cell. Mickens answered, "They said I stabbed somebody 140 something times in the head." Mickens then lowered his voice and said, "which I did." Mickens also told Brister

that "they" said he also sodomized the victim and stole his sneakers. Again, Mickens lowered his voice and said, "which I did."

Mickens v. Commonwealth (Mickens I), 442 S.E.2d at 681-683 (footnotes omitted).

### *C. The Facts of the Resentencing*

In the 1996 resentencing, the Commonwealth again presented the evidence of Mickens' prior convictions. He was convicted of attempted larceny from the person in 1973; sodomy, robbery and grand larceny from the person in 1973; and sodomy and robbery in 1980. Mickens v. Commonwealth (Mickens III), 478 S.E.2d at 304.

> The evidence also established that Mickens had been paroled from prison three times. His initial parole on October 30, 1973, was revoked on August 16, 1974, because he had been convicted of robbery, grand larceny from the person, and sodomy. Mickens' second parole on July 1, 1979, was revoked on April 11, 1980, because he had been convicted of sodomy and robbery. His third parole commenced on December 19, 1991, and he was on parole when Hall was murdered.
>
> Charles Edward Siron, one of Mickens' sodomy victims, testified that, on February 14, 1974, when he was 18 years old, he and Mickens were incarcerated in the Newport News City Jail. While Siron was sleeping, Mickens put a razor blade to Siron's throat and forced him out of bed and into the shower area where Mickens attempted to sodomize him.
>
> Ruby Bunn, one of Mickens' robbery victims, testified that, on February 7, 1974, she was teaching her second grade class at Erwin School in the City of Newport News. Mickens appeared at the class-room door holding a knife and demanding her pocketbook. Bunn went to get her money from her purse, and, when she looked up, she saw Mickens standing near a small boy and holding the knife a few inches from the boy's head. Bunn gave Mickens her money, and he left the classroom.

Mickens v. Commonwealth, 478 S.E.2d at 304-305.

### *D. The Facts of Counsel's Prior Representation of Hall*

The district court found the following facts concerning the prior representation. Mickens v. Greene, 74 F. Supp. 2d at 599-600, 614. On February 21, 1992, Timothy Hall's mother swore out a complaint against her son for assault and battery. She alleged that on February 16, Hall



grabbed her and shoved her to the ground. On March 13, 1992, Hall was charged with possession of a concealed weapon (a serrated bread knife wrapped in newspaper). The juvenile court's records indicate that both the assault and battery and concealed weapon charges were presented in a detention hearing on March 20, 1992. Substitute Juvenile Court Judge Criver appointed Brian Saunders to represent Hall and continued the hearing to April 3, 1992.

Between March 20 and March 28, Hall met one time with Saunders at the attorney's office for 15-30 minutes. Hall was last seen alive on March 28, 1992, a Saturday, and his body was found on Monday, March 30, 1992. The juvenile court's records show that on Friday, April 3, 1992, before any hearing was conducted, a different Juvenile Court judge, Foster, noted on the docket sheet, "removed from docket" and "Def. Deceased." On the same day, Saunders appeared at the juvenile court for the scheduled hearing on Hall's charges and was told by someone that Hall was dead and the charges had been dismissed. This information was not a matter Saunders learned in court and most likely came from a court clerk.

Mickens was arrested on Saturday April 4, 1992, and on Monday April 6, 1992, Judge Foster appointed Saunders and Warren Keeling to represent Mickens. Keeling had no knowledge of Saunders' prior representation of Hall at the time of Mickens' trial, sentencing and resentencing.

### *E. The District Court's Findings of No Actual Conflict or Adverse Effect.*

The district court conducted a full evidentiary hearing and found the following facts supporting its determination that Mickens had failed to demonstrate an actual conflict of interest:

"Saunders' representation of Hall was very limited in scope and duration." Mickens v. Greene, 74 F. Supp. 2d at 604. The representation of Hall did not involve the same subject matter as the charges facing Mickens and did not involve the same criminal transactions or

events. Id. Mickens failed to show that Hall was a prostitute, or that he had consented to sexual relations with Mickens. Id. "Mickens has failed to demonstrate a correlation, much less a substantial and particular relationship, between Saunders' representation of Hall for assault and possession of a concealed weapon and his representation of Mickens on attempted forcible sodomy and capital murder charges." Id. at 605.

The district court strongly stated its disapproval of Saunders' failure to appreciate the ethical issues posed in these circumstances but, after hearing the testimony and considering petitioner's evidence, found that Mickens failed to establish that Saunders possessed a personal interest in concealing the alleged ethical conflict in representing Mickens. "[T]he evidence shows that, regrettably, Saunders never struggled with the ethical issues envisioned by Mickens." Mickens v. Greene, 74 F. Supp. 2d at 605. "[T]he Court is unconvinced that ... selfish 'loyalties or interests' existed, much less motivated Saunders' silence" about the prior representation of Hall. Id. at 612.

Saunders considered his representation of Hall ended when the juvenile charges were dismissed. Mickens v. Greene, 74 F. Supp. 2d at 605. Saunders did not perceive any "actual conflict," did not think he had received any confidential communications from Hall, and saw no connection between the two cases. Id. at 606. "[T]he Court concludes that, as a factual matter, Saunders did not believe that any "continuing duties to a former client might interfere with his consideration of all facts and options for his current client." Id.(internal punctuation omitted).

"[T]he record here confirms that Saunders did not learn any confidential information from Hall that was relevant to Mickens' defense either on the merits or at sentencing." Mickens v. Greene, 74 F. Supp.2d at 606. Hall's record of juvenile charges was not relevant to Mickens' defense because Mickens' testimony foreclosed any theory of self-defense. Id. at 606, n.15.



The District Court also carefully considered and rejected Mickens' allegations of an "adverse effect":

A "consent defense" was an "implausible alternative theory" foreclosed by the evidence, including choke marks found on the victim's neck, blood stains on Hall's thighs, 143 stab wounds, and Mickens' own insistence to his attorneys and in his testimony that *he did not know Hall and had no involvement in these crimes*. Mickens v. Greene, 74 F. Supp. 2d at 607. "Saunders discarded consent as a strategy not because of any loyalty to Hall, but because neither the facts nor Mickens' testimony was compatible with such a strategy." Id. The Fourth Circuit specifically upheld these findings. Mickens, 240 F.3d at 361-362.

Using "negative information" about Hall at sentencing, based on the premise that it would mitigate the severity of a capital murder, was inconsistent with Mickens' own statements of innocence and sympathy and would have appeared disingenuous. Mickens v. Greene, 74 F. Supp. 2d at 608. After "diligent investigation by federal habeas counsel," Mickens failed to uncover any evidence to show that Hall was a male prostitute. Id. Such evidence would have been useful only in connection with the unavailable consent defense, and "the propensity of that approach to backfire made it an unreasonable alternate strategy or tactic at sentencing." Id. Even if such "negative information" existed and could be considered as offering a plausible strategy, it was Mickens' second lawyer, Keeling, and not Saunders, who was in charge of preparing for sentencing. Keeling was aware of Hall's juvenile charges and other circumstances of his life from a newspaper report, and he did not consider any of that information relevant. Id. The Fourth Circuit specifically upheld these findings. Mickens, 240 F.3d at 361-362.

Saunders did not engage in extensive plea negotiations because the Commonwealth's Attorney had rejected any plea agreement for a sentence less than death. Mickens v. Greene, 74

F. Supp. 2d at 608-609. Using information about Hall's juvenile charge of assaulting his mother to "rebut" her 1996 victim impact statement containing assertions of grief would have been inconsistent with Mickens' statements of sympathy and not a viable tactic in the context of Virginia's sentencing process. Id. at 609-610. The Fourth Circuit specifically upheld these findings. Mickens, 240 F.3d at 361-362.

Mickens' allegations that Saunders conducted a deficient investigation into leads about other possible suspects had no connection to the alleged actual conflict. "Mickens may carry this burden by showing that pursuit of these leads was inherently in conflict with Saunders' other loyalties or interests or by other probative evidence that he did not pursue the leads because of those interests. This he has failed to do." Mickens v. Greene, 74 F. Supp. 2d at 612 (citation and internal punctuation omitted). The Fourth Circuit also specifically upheld these findings. Mickens, 240 F.3d at 361-362.

**REASONS WHY THE WRIT AND APPLICATION FOR A STAY OF EXECUTION SHOULD BE DENIED**

Mickens asks this Court to stay his execution and grant certiorari in this collateral case to review his defaulted claim that a state judge failed to conduct an inquiry into a possible conflict of interest which he asserts was required by this Court's decision in Wood v. Georgia, 450 U.S. 261 (1981). Mickens presents his claim of conflict as if it were being raised on direct appeal and as if the fact of an attorney's prior representation of a defendant's victim alone constitutes a *per se* conflict.[1] This Court, however, never has suggested that any particular combination of

[1] Claims of a Sixth Amendment violation have been rejected in circumstances where the alleged conflict involved an attorney's prior representation of a defendant's victim. See Crisp v. Duckworth, 743 F.2d 580, 588 (7th Cir. 1984) (finding no conflict when defense counsel previously represented murder victim in unrelated criminal action); Kirkpatrick v. Butler, 870 F.2d 276, 284 (5th Cir. 1989) (finding no conflict where defense counsel had friendship with,



representations makes out a conflict of interest as a matter of law. See Burger v. Kemp, 483 U.S. 776, 783 (1987) (law partners representing codefendants treated as "one attorney," and "it is settled that...'joint representation[ ] is not per se violative of constitutional guarantees of effective assistance of counsel'"), quoting Holloway v. Arkansas, 435 U.S. 475, 482 (1978). "We have never held that the possibility of prejudice that 'inheres in almost every instance of multiple representation' justifies the adoption of an inflexible rule that would presume prejudice in all such cases." Burger, 483 U.S. at 783, quoting Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Instead, to demonstrate a Sixth Amendment violation involving a conflict of interest, a petitioner must establish that his attorney was burdened with "an actual conflict of interest" that "adversely affected" the lawyer's performance. Sullivan, 446 U.S. at 349. "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. at 350.

Mickens argues that the Fourth Circuit's decision denying federal habeas corpus relief on his defaulted claim erroneously held him to the burden of demonstrating that an "actual conflict of interest adversely affected" his attorney's representation, and allegedly conflicts with Wood and other direct appeal decisions of several federal and state courts of appeals. He also asserts the existence of a split among the circuits on subsidiary issues of whether a petitioner must demonstrate some "link" between an alleged conflict and "adverse effect" and how that linkage is demonstrated.

and had in the past represented, members of murder victim's family); Mosely v. Scully, 908 F. Supp. 1120 (E.D. N.Y. 1995) (finding no actual conflict where counsel previously represented murder victim on unrelated charges); Dixon v. Quarles, 627 F. Supp. 50 (E.D. Mich.) (finding no actual conflict even though defense counsel previously represented the murder victim), aff'd, 781 F.2d 534, 535 (6th Cir. 1985).

Mickens' petition does not present "compelling reasons" warranting this Court's review. U.S. Sup. Ct. Rule 10. His Wood v. Georgia claim fails for a variety of reasons independent of Mickens' arguments in this Court. First, and most obviously, this is a defaulted claim, never raised in the state courts, and, as the Fourth Circuit found, Mickens has failed to demonstrate prejudice from his default.

Second, the claim fails as a matter of law because Mickens has failed to prove an "actual conflict" as a matter of fact. The district court conducted a full evidentiary hearing, made unambiguous findings of fact supported by the evidence and the court's credibility findings, and determined that any potential for conflict never "ripened" into an "actual conflict." These findings of fact, which Mickens does not even challenge as "clearly erroneous," independently defeat Mickens' claim that he can show a Sixth Amendment violation on the basis of an "actual conflict" without being required to show that the conflict "adversely affected" counsel's representation. Mickens' claim that the state court should have initiated an inquiry falters on the fact that the trial judge undeniably had no knowledge of even a possible conflict and Mickens failed to demonstrate that a state juvenile court judge knew or should have known of any particular conflict whatsoever.

Third, the supposed disagreement that Mickens asserts exists between the Fourth Circuit's decision and this Court's precedents is no conflict at all, because the Fourth Circuit correctly interpreted this Court's conflict of interest decisions. Moreover, the several variations among the circuits and state courts in the description of Wood v. Georgia claims does not present any real conflict in the application of federal law which requires this Court's attention in this case. Mickens' hypertechnical argument that the Fourth Circuit's analysis of "adverse effect"



somehow conflicts with the decisions of other circuits is based on Mickens' misreading of the decision in his case and the application of law in other cases.

Finally, this Court must see Mickens' argument for what it is: a plea to ***extend*** the law governing conflict of interest claims beyond what the lower courts quite reasonably have found to be clearly established. This type of extension, or even "fleshing out" of rules, simply is not permitted on collateral review and thus requires denial of certiorari review in this case.

## I. MICKENS HAS NOT DEMONSTRATED COMPELLING REASONS FOR THIS COURT TO REVIEW HIS DEFAULTED AND MERITLESS WOOD v. GEORGIA CLAIMS.

### *A. The Court Should Not Grant Certiorari to Review a Defaulted Claim For Which Mickens Has Not Demonstrated Prejudice.*

In arguing that he presents issues decided "squarely on the merits," Mickens strategically ignores the fact that his conflict of interest claims are defaulted, that every judge who has reviewed his claims has acknowledged the procedural default, and that the merits of his claims have been addressed ***only*** in the context of determining whether Mickens could establish "prejudice" for purposes of avoiding his default.[2] See Wainwright v. Sykes, 433 U.S. 72, 87-91 (1977) (stating "cause and prejudice" test for federal habeas review of defaulted claims); Gray v. Netherland, 518 U.S. 152, 161-162 (1996) (claims never presented in state habeas action are

[2] The *en banc* majority rejected the Respondent's argument that Mickens had failed to show "cause" for his default, finding that Saunders never volunteered the fact of his prior representation, state law generally makes juvenile records confidential, and federal habeas counsel "fortuitously" discovered the prior representation through a "clerk's mistake" while investigating Mickens' victim. Mickens, 240 F.3d at 356. The Respondent argued below that the information could have been equally available to state habeas counsel had that attorney raised any claims suggesting a need to investigate the victim's juvenile record. Notwithstanding Virginia's juvenile law confidentiality provisions, ***petitioner's own exhibits in the federal evidentiary hearing established that the fact of Tim Hall's juvenile charges was publicly known long before Mickens' trial.*** (Resp. App. 1-2, 14-15).

defaulted). See also Virginia Code §8.01-654.1 (capital habeas petitioners limited to one petition filed after certiorari denied on direct appeal). To demonstrate prejudice, Mickens "must shoulder the burden of showing not merely that the errors of his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982); Murray v. Carrier, 477 U.S. 478, 494 (1986).

The district court and the *en banc* Fourth Circuit majority evaluated prejudice by determining that Mickens' failure to prove his conflict claim on the merits resolved the issue. Mickens v. Greene, 74 F. Supp. 2d at 602; Mickens, 240 F.3d at 356-357. The panel majority also had assessed "prejudice" in terms of the merits of Mickens' claim but it held that Mickens could establish Frady prejudice simply by relying on the "presumed prejudice" of what it thought was a successful Sixth Amendment claim. Mickens, 227 F.3d at 210.

Because Mickens completely ignores the default posture of this claim, he has not argued in this Court that he can demonstrate prejudice under ***any*** theory. However, even assuming Mickens adopts the position of the panel majority, he still cannot demonstrate Frady prejudice. First, Frady specifically defines "prejudice" for defaulted claims and expressly differentiates it from the burden required to prevail on the merits of a preserved habeas claim, or even a defaulted claim on direct appeal. See Frady, 456 U.S. at 164, 169. *Notably, obtaining federal collateral relief for a* ***preserved*** *claim does not require meeting the significantly higher burden of demonstrating the actual and substantial prejudice that Frady requires for a* ***defaulted*** *claim.* See Brecht v. Abrahamson, 507 U.S. 619 (1993) (applying "substantial and injurious effect or influence" standard, not "harmless beyond a reasonable doubt" standard, for cases of constitutional trial error which are subject to harmless error review).



Second, the "presumed prejudice" required for Sixth Amendment claims that the panel majority borrowed from Sullivan, 446 U.S. at 349-350, simply is not the same as Frady prejudice. In United States v. Cronic, 466 U.S. 648 (1984), this Court allocated presumptive prejudice to the circumstances of outright absence, or prevention of the assistance, of counsel, id. at 659, at n. 25, but "[a]part from circumstances of that magnitude... there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors undermined the reliability of the finding of guilt" Id. at 659, n.26. The prejudice that is presumed when "counsel actively represented conflicting interests," Sullivan, 446 U.S. at 350, "is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims" described in Cronic. Strickland v. Washington, 466 U.S. 668, 692 (1984). This Court repeatedly has stressed that petitioner must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance," ***before*** presuming Sixth Amendment prejudice. Id.; see Sullivan, 446 U.S. at 350.

The panel majority's construction of prejudice would have permitted Mickens to obtain federal collateral relief, on a defaulted claim, without demonstrating ***any*** prejudice, ***or even*** the lesser showing of an "adverse effect." As a matter of established fact in this case, the district court found after a full evidentiary hearing that Mickens failed to demonstrate any "actual conflict" ***and*** failed to show any "adverse effect" on his lawyer's representation, thus precluding Mickens' attempt to claim the presumptive prejudice recognized for successful conflict of interest claims. Mickens does not argue in this Court that the district court's findings establishing that there was no actual conflict are clearly erroneous; indeed, he makes only a token effort at challenging the findings of the district court and the Fourth Circuit that he cannot show any "adverse effect."

Mickens undeniably has failed to satisfy the factual prerequisite for claiming any Sixth Amendment "presumed prejudice," much less for establishing the ***actual*** Frady prejudice independently required to overcome his default. Mickens' petition thus is singularly unsuited for review because it provides the Court no real opportunity to address the issues Mickens presents as if he had preserved them for review on direct appeal.

***B. The District Court's Unchallenged Factual Findings Establish that Mickens Failed to Demonstrate the Existence of an "Actual Conflict."***

Certiorari must be denied because it is an uncontested fact that no actual conflict existed in this case. The district court conducted a thorough evidentiary hearing in this case, made specific factual findings fully supported by the evidence and credibility findings, and found that Mickens failed to establish an "actual conflict of interest." No judge of the Fourth Circuit disputed any finding of the district court as "clearly erroneous," and Mickens does not assert even now that the district court's findings are subject to challenge on that ground. Instead, Mickens misstates the Fourth Circuit's decision below as assuming that an actual conflict had been established by the evidence, when in fact the *en banc* majority determined that "because we find that Mickens has failed to identify an adverse effect...we do not reach his argument that he has established an actual conflict of interest." Mickens, 240 F.3d at 360.[3]

[3] The decision not to address the finding of no "actual conflict" certainly does not mean the Fourth Circuit silently overturned the district court's factual findings. The court was not required to resolve both parts of Sullivan's two-part test when Mickens had failed to establish "adverse effect." See Dukes v. Warden, 406 U.S. 250, 256 (1972) (finding alleged conflict had not affected guilty plea). This is not an unusual approach to two-part tests generally, see Strickland v. Washington, 466 U.S. at 697 (reviewing court can decide ineffectiveness claim on lack of prejudice); Frady, 456 U.S. at 168 (unnecessary to determine "cause" when petitioner had failed to show "prejudice" from default), nor specifically in the Fourth Circuit's disposition of conflict claims. See Williams v. French, 146 F. 3d 203, 212 (4th Cir. 1998) ("Even if we assume the existence of an actual conflict, Williams has not established that any conflict adversely affected his counsels' performance.").



The Fourth Circuit's disposition does not suggest any concern with the district court's findings of fact. In its decision finding no "adverse effect," the *en banc* majority unambiguously ***upheld*** the district court's findings:

> Conflict claims present mixed questions of law and fact that we review de novo. The district court's factual findings, however, are subject to the clearly erroneous standard set forth in Rule 52(a), Fed. R. Civ. P. ***Because much of the adverse effect inquiry is heavily fact dependent, we believe appropriate deference should be given to the findings of the district court.*** In this respect, we note that a significant part of the evidence was taken orally, and the district judge saw the witnesses and heard them testify. We also note that the opinion of the district court was complete, thorough and thoughtful.

Mickens, 240 F3d at 360 (internal citation and punctuation omitted) (emphasis added). Because of the overlapping nature of "actual conflict" and "adverse effect," the Fourth Circuit majority also upheld findings supporting the district court's ruling that Mickens failed to demonstrate any "actual conflict." Mickens, 240 F.3d at 360-362. Significantly, even the dissenting judges below never found that the district court's findings were clearly erroneous.[4] Mickens appears to adopt the suggested "actual conflicts" advanced by the ***panel*** majority, but, like those judges he fails even to acknowledge the district court's factual findings that expressly preclude finding an actual conflict of interest existed.

The panel majority concluded that Saunders violated ethical obligations to explain to Mickens "any circumstances that might cause a client to question [counsel's] undivided loyalty," and to withdraw from representation if Mickens so desired. Mickens, 227 F.3d at 214-215. The

[4] The *en banc* dissent simply refers to the panel majority opinion regarding the issue of whether an actual conflict existed. Mickens, 240 F.3d at 369. Judge Michael's panel opinion criticized the district judge for placing "great weight" on Saunders' testimony concerning whether Saunders had perceived a conflict, yet nonetheless accepted the district court's credibility determination. Mickens, 227 F.3d at 214 ("because the district court took Saunders' testimony as truthful, so do we").

panel majority then enhanced the perceived ethical lapse by assuming, directly contrary to the district court's first-hand findings, that Saunders actually had developed a personal interest in *concealing* the fact of his earlier representation to avoid professional discipline and protect his reputation. The panel then simply announced: "Saunders was thus caught in an actual conflict." Id. at 215.

The district court's specific factual findings that Saunders had not developed any personal interest that conflicted with Mickens' interests was not simply crediting Saunders' denial of a conflict. The district court's specific and unchallenged factual findings which never even were mentioned by the panel, directly contradict the basic factual assertions underlying the panel's theory: the district court found that "Saunders never struggled with the ethical issues envisioned by Mickens." Mickens, 74 F. Supp 2d at 605. The district judge who had seen and heard Saunders found as a fact that Saunders was not animated by an ethical lapse:

> Without condoning the inexcusable failure to disclose the previous representation of Hall, the Court concludes, ***as a factual matter, Saunders did not believe that any continuing duties to a former client might interfere with his consideration of all facts and options for his current client.***

Id. at 606 (internal punctuation omitted) (emphasis added).

> Saunders did not believe the Hall representation was a source of relevant information or potential conflicts for the Mickens case. Thus, as far as he was concerned, his perception ended the matter for all concerned: his client, the court, and co-counsel. ***The record does not demonstrate that Saunders' silence, albeit inexcusable, was attributable to Saunders' self-interest.***

Id. at 612-613 (emphasis added).

The panel majority purported to give these findings their due respect when it assumed Saunders' testimony was "truthful," but then proceeded to circumvent those very findings, effectively reweighing the testimony and making the exact opposite finding: that Saunders violated



ethical rules, feared sanctions, and had an interest in concealing his misconduct to the detriment of Mickens. Mickens, 227 F.3d at 215. Mickens cannot simply substitute the panel majority's speculative assertions lacking any evidentiary support for the credibility findings made by the district court who saw and heard the witness.

The panel majority also accepted Mickens' argument that Saunders' continuing duty to preserve the secrets and confidences of Hall "diverged from Mickens' interest in pursuing a course of action, specifically, a reasonable pre-trial investigation," Mickens, 227 F.3d at 216-217, which would have included investigating "negative information about Hall," the victim's "character and background," Hall's "tendency to violence or aggressiveness," and why Hall no longer lived at home. This information, together with the "notable location of Hall's murder," suggested to the panel majority potential defenses of consent to the sodomy and self-defense, which Saunders allegedly could not investigate because of his residual duty to protect Hall's confidences. Id. at 217.

The district court, however, after hearing all the evidence, expressly rejected this outlandish argument that can be considered only if the compelling facts of the murder – including the condition of Hall's body as shown in photographs taken of Hall laying on his stomach, bent over a mattress and stabbed 143 times – are completely ignored. (Resp. App. 3-8). Petitioner alludes to information from a local newspaper as describing the site where Mickens chose to murder Hall as one "used for homosexual trysts," and he asserts that the difficulty in reaching the location might suggest that Hall ***went there voluntarily***, all presumably to suggest the possibility of mounting a ridiculous "consent" defense to sodomy or that "negative

information" existed about Hall.[5] Pet. at 8. However, testimony in the evidentiary hearing described several methods of accessing the riverside at that location (Resp. App. 9-11) and, as the district court noted, Hall's body was found to have "choke-hold" type marks on his neck. Mickens v. Greene, 74 F. Supp. 2d at 607. The speculation about Hall's sexual activities was rejected in the district judge's explicit finding that even after "diligent investigation by federal habeas counsel," no evidence showed that Hall was a "male prostitute."[6] Mickens v. Greene, 74 F. Supp. 2d at 608.

The district court carefully considered and rejected the notion that any defense or mitigation strategy based on a theory of consent was in conflict with Saunders' loyalty to a former client or his duty to maintain a former client's confidences. Saunders had no information from Hall or any other source to support a theory of consent, and it certainly was not consistent with the evidence. As stated Hall's body exhibited over 140 stab wounds inflicted while he was bent over a mattress on his stomach. (Resp. App. 3-8). ***Most importantly, Mickens never suggested consent as a possible defense, but personally insisted on denying involvement in these crimes to his attorneys and in his own testimony, which precluded a consent defense.*** Mickens v. Greene, 74 F. Supp. 2d at 607. The district court's finding that Saunders rejected consent as a possible defense because it could not be supported by the facts and Mickens'

[5] Mickens also asserts that Saunders failed to investigate "leads" about other people who might have had a motive to murder Hall. He presented this allegation below as an example of an "adverse effect" and the district court found that there was no evidence connecting these leads to Saunders' representation of Hall. Mickens v. Greene, 74 F. Supp 2d at 612.

[6] Saunders' co-counsel, Keeling, had investigated before trial rumors about Hall reported in the local newspaper shortly after the murder. (Resp. App. 12-15). He spoke to people who lived in the area near Hall and others who knew Hall at his church, and ***was not able to find any evidence that Hall was a homosexual or "male prostitute."*** (Resp. App. 16-19, emphasis added).



testimony, and not because of any loyalty to Hall, cannot be deemed clearly erroneous and is quite obviously the truth.[7] Id.

Saunders was the lead counsel in the case but, as even the panel majority admitted, co-counsel Warren Keeling took the lead at the sentencing proceedings. Mickens, 227 F.3d at 208. The district court found that Keeling had investigated rumors about Hall based on the information in the newspaper articles published shortly after Hall's body was found. Mickens v. Greene, 74 F. Supp. at 608. Keeling was aware of Hall's reported assault on his mother, the weapon charge, and his living away from home, and he found nothing in that information worth pursuing for Mickens' defense. Id. Thus, not only did Saunders' knowledge of so-called "confidential information" about the fact of Hall's juvenile charges not create any actual conflict for Saunders, but Mickens cannot claim any denial of his Sixth Amendment rights because he also was represented by undeniably conflict-free counsel who had the responsibility to prepare for the sentencing, knew the relevant facts about Hall, and independently decided after investigation not to pursue so-called "negative information" about Hall. Id. Mickens, of course, has not acknowledged this evidence and the district judge's findings in this Court.

The limited information Saunders knew from Hall never had any connection to Mickens' case and the district court's findings confirm that Saunders never possessed any interest connected

[7] Petitioner ***now*** suggests that the district court could not rely on Mickens' own testimony which by itself precluded any theory of consent because it was produced in a trial where Mickens was represented by an attorney who allegedly could not use information unfavorable to Hall. He further suggests that Saunders otherwise might have counseled his client to forego testifying in an attempt to develop theories which Mickens has yet to suggest have any basis in fact. (Pet. at 10, n.10). The evidence presented to the district court, however, was uncontradicted: Mickens consistently denied involvement in these crimes or even knowing Tim Hall in his discussions with both of his lawyers and in his testimony, and ***Mickens*** insisted on exercising his right to testify. Mickens v. Greene, 74 F. Supp. 2d at 607.

to his prior representation of Hall that conflicted with representing Mickens' interests. Saunders thus was not "actively representing conflicting interests." Absent a showing of an "actual conflict," Mickens cannot demonstrate a Sixth Amendment violation even under the theory he asks this Court to embrace. Certiorari thus is inappropriate, not only because Mickens' claim is defaulted, but also because he asks for review of a legal issue that fails for want of proof of the predicate fact.

### *C. The En Banc Fourth Circuit Correctly Applied This Court's Precedents.*

No compelling reason would exist for review of the Fourth Circuit's application of this Court's precedent governing conflict claims, even if Mickens' default and the district court's dispositive factual findings were ignored. Mickens' argument is fundamentally weak. It is that Wood v. Georgia, ***by omission***, overruled prior Sixth Amendment precedent which held that a defendant who fails to object at trial to circumstances possibly suggesting a conflict of interest must demonstrate that his attorney possessed an actual conflict of interest that adversely affected his lawyer's representation in order to show a Sixth Amendment violation.

At the time Wood was decided, this Court's precedents established certain well-defined requirements for a valid Sixth Amendment conflict of interest claim. In Holloway v. Arkansas, 435 U.S. 475, 488 (1978), the Court had concluded that a trial court's action improperly requiring joint representation over a timely objection deprived the defendants of their right to counsel and that "reversal is automatic" without regard to prejudice. Two years later, in Cuyler v. Sullivan, 446 U.S. 335 (1980), the Court addressed two issues expressly reserved in Holloway and decided that: (1)"Absent special circumstances," a trial court is not required to initiate an inquiry simply because of the joint or multiple representation. "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry;" and, (2) ***When there is no objection at trial to multiple representation***, the defendant cannot



prevail merely by showing the possibility of a conflict, but must "demonstrate that an ***actual conflict of interest adversely affected his lawyer's performance***." 446 U.S. at 346-348 (emphasis added).

In Wood, a direct appeal case, the Court granted certiorari to decide the constitutionality of imprisoning probationers who failed to make installment payments on fines, 450 U.S. at 264, but declined to reach this issue and instead remanded the case for determination of a conflict of interest issue which had not been raised, briefed or argued, but which the Court itself identified in the record. The factual circumstances strongly suggested the possibility that the employer and the attorney representing the petitioners might have encouraged the petitioners' predicament in allowing imposition of fines beyond their means to pay as a way to create a test case on the constitutional issue.[8] If the attorney "was serving the employer's interest in setting a precedent," there was a "clear possibility of conflict of interest." Id. at 267-268. The Court announced that the case was remanded to the state trial court to hold a new revocation hearing if it found that an actual conflict of interest existed, and that it had not been waived. Id. at 273-274.

Strictly speaking, Wood is not a Sixth Amendment case. Wood, 450 U.S. at 273 ("we base our decision in this case on due process grounds"). Because the Court was confronted with a situation concerning counsel in a probation revocation hearing, the Sixth Amendment right to counsel could not be implicated, and the Court concluded that the employees possessed a due process right to counsel, which also included a right to conflict-free counsel. Id. at 271; see also Gagnon v. Scarpelli, 411 U.S. 778 (1973) (due process requires provision of counsel in some

[8] The state's attorney repeatedly had brought the potential conflict to the attention of the trial court, but the court conducted no inquiry into the issue. Wood, 450 U.S. at 266 n.5, 272; id. at 277 n.1 (White, J., dissenting).

contexts not included within Sixth Amendment grant). Wood's only comment on Sixth Amendment precedent in this area was the single mention of Sullivan in footnote 18 responding to Justice White's dissenting opinion, which had criticized the majority for using Sullivan to assume "jurisdiction over a claim otherwise beyond its reach:"

> Justice White's dissent states that we have gone beyond the recent decision in Cuyler v. Sullivan. Yet nothing in that case rules out the raising of a conflict-of-interest problem that is apparent in the record. Moreover, Sullivan mandates a reversal when the trial court has failed to make an inquiry even though it "knows or reasonably should know that a particular conflict exists."

Wood, 450 U.S. at 272 n.18. (citation omitted).

Mickens adopts the view of the Fourth Circuit dissenting judges who saw Wood as addressing a different category of conflict of interest claims than that presented in Holloway or Sullivan, and decided it would be good for each category to have its own rule.[9] According to this argument, the circumstances of Wood where a trial court should know of a particular conflict but fails to inquire should fall somewhere between the automatic reversal rule of Holloway for claims preserved by objection to multiple representation, and the actual conflict/adverse effect rule of Sullivan for claims where no objection was made and the trial court lacked sufficient notice of a particular conflict to be obligated to inquire. Mickens, 240 F. 3d at 366. The dissenters below argued that the appropriate test for this intermediate case can be gleaned from the Wood remand order which they characterized as requiring only a showing of an actual conflict. The creation of this new sub-species of conflict claim and remedy, however, was based

[9] In the court below, Mickens initially argued that he was entitled to an "automatic reversal" because the state juvenile judge failed to inquire when she should have known of a particular conflict, without regard to a finding of actual conflict or adverse effect. The panel majority declined to reach this argument, Mickens, 227 F.3d at 212, n.3, and the *en banc* majority expressly rejected it. Mickens, 240 F.3d at 358-359, n.6. Only later on rehearing did Mickens adopt the panel majority's position concerning Wood.



on a flawed concept of subdividing tests that simply is not supported by this Court's precedent, not to mention an unauthorized exercise of new rule making on collateral review. See Gray v. Netherland, 518 U.S. 152, 166-167 (1996); Saffle v. Parks, 494 U.S. 484, 487-488 (1990).

This Court already had determined in Sullivan that the analysis of a conflict claim turned on whether the defendant had objected to the representation.[10] Mickens' argument that Wood created a new Sixth Amendment standard is constructed awkwardly by hypothesizing that in Wood the Court was answering a question left open in Sullivan concerning the standard for assessing "knew or should have known" conflict claims. Because Mickens spies different formulations of a standard for assessing conflicts in the two opinions, both written for the Court by Justice Powell, he concludes that the Court must have been announcing new law.[11]

Wood was a fractured decision and clearly dealt with a remarkable factual circumstance. Most significantly, it involved parties who had not briefed, or even asserted, a conflict of interest as grounds for relief. In these unusual circumstances, the Court's instruction to the inferior court unfortunately was imprecise in its treatment of Sixth Amendment precedent. The footnote

[10] The Court's opinion in Sullivan never even hinted at some intermediate standard allowing a demonstration of an "actual conflict" alone as sufficient to establish a Sixth Amendment violation if a trial court fails to inquire into an "apparent" conflict. In a dissenting opinion, Justice Brennan indicated that the burden of proving that a defendant's representation "was not actually affected by the possibility of conflict" should be shifted to the State when a trial court fails to inquire into possible conflicts in multiple representation. See Sullivan, 446 U.S. at 354 (Brennan, J.). Justice Marshall indicated that he would jettison the "adverse effect" requirement for a defendant who failed to object to multiple representation because it is unnecessary and often impossible to prove. Sullivan, 446 U.S. at 356-357 (Marshall, J., dissenting).

[11] In addition to authoring the Court's opinions in Sullivan and Wood, Justice Powell also wrote separately in Holloway v. Arkansas, ***disagreeing*** with the Court's presumption of prejudice from the failure to conduct an inquiry into a possible conflict brought to the trial court's attention. 435 U.S. at 492. There, Justice Powell suggested that the remedy for such a failure was to shift to the State the burden "to establish the improbability of conflict or prejudice." He did not espouse doing away with a prejudice inquiry. Id. at 496.

containing the only reference to relevant precedent asserted that Sullivan "mandated a reversal" in the circumstances there presented, when in fact Sullivan only mandated "automatic reversal" for Holloway claims, i.e., where the trial court refuses to consider timely objections asserting conflicting interests. Sullivan, 446 U.S. at 345. Sullivan set up a different standard only for cases where the defendant did not object at trial. Id. at 348-349. If Sullivan in fact ***had*** required reversal when a trial court failed to inquire into possible conflicts of which the court should have known, then the remand order in Wood directing the trial court to determine whether an "actual conflict" existed, after this Court already had determined that the conflict was sufficiently apparent to necessitate inquiry, would have been entirely superfluous.

The Fourth Circuit majority properly concluded that Wood should not be read to alter existing law. Indeed, the lack of precision in discussing the precedential basis for the remand order in Wood is an affirmative indication supporting the Fourth Circuit's conclusion that this Court simply was applying established law, and not announcing new tests without briefing, argument or even discussion in the Court's opinion. As the *en banc* majority properly observed, Wood did not find that a constitutional violation was established, and that fact alone contradicts reading footnote 18 as stating a rule of automatic reversal. Mickens, 240 F. 3d at 359.

The court below also correctly rejected Mickens' argument that Wood eliminated ***by implication*** Sullivan's requirement that he show an "adverse effect" simply because Wood omitted a specific reference to that term in the remand order. Mickens, 240 F. 3d at 359-360. The Fourth Circuit correctly observed that the actual discussion of the conflict claim in Wood demonstrates convincingly that the Court's use of the term "actual conflict" referred broadly to an actual conflict and its effects on the petitioners' representation:



> [T]he Wood Court noted that "on the record before us, we cannot be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him." Wood, 450 U.S. at 272. If defense counsel had been so influenced, the Court stated, the due process rights of petitioners were not respected." Wood, 450 U.S. at 272. After these observations, the Court concluded that it was difficult "to determine whether an actual conflict of interest was present." Wood, 450 U.S. at 272. Those comments underscore that the Court was searching the record not just for a conflict of interest, but also for some indication that the conflict adversely affected the attorney's representation of the defendants. When read in this light, the Wood Court's terse instruction to the trial court on remand simply cannot bear the constitutional weight Mickens ascribes to it.

Mickens. 240 F. 3d at 360. See also Wood, 450 U.S. at 268, n.14 ("There is also a danger that petitioners' lawyer was influenced in his strategic decisions by other improper considerations.").

Twenty years ago, when Wood was decided, the meaning of the terms, "actual conflict" and "adverse effect," still were being fleshed out. Even then, as Justice Marshall noted in his dissent, "'[c]onflict of interest' is a term that is often used and seldom defined." 446 U.S. at 356, n.3. Sullivan itself did not attempt to define the terms fully or separately, but observed that an actual conflict was shown to have "impaired the defense" in Glasser, and not to have caused an "actual lapse in representation" in Dukes v. Warden, 406 U.S. 250, 256 (1972). See Sullivan, 446 U.S. at 349. The Court's discussion rejecting Sullivan's claims mixed what courts now likely consider as "adverse effects" into the calculus of "actual conflict." See Sullivan, 446 U.S. at 347-348 (considering "counsel's critical decision to rest Sullivan's defense" as a facially "reasonable tactical response to the weakness of the circumstantial evidence presented by the prosecutor," in determining whether a conflict was suggested).

As the Fourth Circuit majority correctly recognized, "the two requirements of the Sullivan test, 'an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analysis of them overlap.'" Mickens, 240

F.3d at 361, quoting United States v. Tatum, 943 F.2d 370, 375 (4th Cir. 1991). Thus, it certainly is not surprising that Wood referred to incidents of "influences" on counsel's actions interchangeably with its concern over an "apparent" conflict. Wood obviously used the term "actual conflict" as "shorthand" for the Sullivan test, as the Fourth Circuit reasonably concluded. Certainly the mere omission of an explicit reference to "adverse effect" under the unusual circumstances presented in Wood did not mean that the Court intended to ***overrule*** the established Sullivan standard that was not even mentioned in the Court's opinion. Mickens, 240 F.3d at 360.

The new test Mickens discerns in Wood had no history before Wood; it certainly never was suggested in Holloway or Sullivan. There is a complete absence of any discussion of reasoning in Wood that would prompt the Court to choose only one part of Sullivan's two-part test as its new standard, and to select "actual conflict" over "adverse effect" as the appropriate measure. Wood did not announce a new standard nor silently overrule the old. This Court never has suggested that Wood altered pre-existing Sixth Amendment precedent sub silentio. In Strickland v. Washington, 466 U.S. at 692 – decided three years ***after*** Wood - the Court expressly reaffirmed Sullivan's actual conflict/adverse effect requirement for defendants who raised no objection at trial, without ever hinting that this standard was subject to further subdivision in other circumstances. The Fourth Circuit's decision to apply clear precedent and to forego the hypertechnical reconfiguration of Sixth Amendment law offered by Mickens in this collateral case simply presents no question worthy of certiorari review.



### *D. Mickens Failed To Demonstrate That The Trial Court, Or The State Juvenile Court, Knew Or Should Have Known Of A Particular Conflict.*

Mickens does not and cannot assert that the ***trial judge*** in his case ever had any duty to inquire into the possibility of a conflict of interest. The circuit court judges who presided over Mickens' 1993 trial and 1996 resentencing are not alleged to have had any knowledge of the facts underlying Mickens' conflict claim. Rather Mickens focuses exclusively on Judge Foster of the Newport News Juvenile and Domestic Relations Court.[12] The en banc Fourth Circuit "accept[ed] for purposes of discussion, without deciding the issue, that Judge Foster reasonably should have known that Saunders labored under a potential conflict of interest arising from his prior representation of Hall." Mickens, 240 F.3d at 357.

Mickens stresses that trial courts have a constitutional duty to inquire into the possibility of conflict of interest, but he fails to explain the authority that would place a trial court's obligations on a juvenile court judge who exercises only limited authority over preliminary stages of the criminal proceedings. The responsibility for assuring that trial proceedings are conducted with complete regard for the defendant's ***trial*** rights properly rests on the ***trial*** judge. See Holloway, 435 U.S. at 484 ("'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused....The trial court should protect the right of an accused to have the assistance of counsel'"), quoting Glasser v. United States, 315 U.S. 60, 71 (1942). The juvenile court in Mickens' case, by contrast, had the much more limited function of conducting a probable cause hearing. Mickens' attempt to create a new obligation on

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[12] Judge Foster was the presiding judge on April 3, 1992, when Timothy Hall's juvenile charges were dismissed after his death, and appointed Saunders on April 6, 1992, to represent Mickens for the capital murder of Hall. Judge Foster had not appointed Saunders to represent Hall; rather that appointment was made by a different, substitute juvenile judge. Mickens v. Greene, 74 F. Supp. 2d at 599-600, 613-614.

"the judge appointing counsel" – especially, as here, one who had not made the prior appointment regarding Hall – without regard to what stage of the proceedings the appointment is made, certainly is not dictated by precedent and obviously would require creation of an impermissible new rule. See Gray, 518 U.S. at 166-167; Saffle v. Parks, 494 U.S. at 487-448.

Even a trial court's "duty to inquire" is limited to those circumstances where a timely objection is made, Holloway, 435 U.S. at 484, or where "the trial court knows or reasonably should know that a *particular* conflict exists." Sullivan, 446 U.S. at 347 (emphasis added). And, in the context of multiple representation cases, this Court has held that the mere knowledge that one attorney represents several defendants is not sufficient to trigger that duty. Id. at 346. Something more, such as "special circumstances" or knowledge of "a particular conflict," must be shown before the trial court is constitutionally obligated to inquire. Id. at 346-347.

Mickens fails to establish the existence of any "special circumstances." The most generous assumption about what Judge Foster reasonably should have known is that Saunders previously represented Hall, that that representation had been concluded prior to any judicial proceeding, and that Saunders was appointed to represent Mickens for the capital murder of Hall.[13] However, because there is no simultaneous or even overlapping representations,

[13] Assuming even this much knowledge is highly speculative. Mickens chose not to offer any direct evidence of what Judge Foster knew. He relied on the fact that on April 3, 1992, Judge Foster filled in only the last entry on a form docket sheet that already contained Hall's name, listed two charges, and listed Saunders as Hall's attorney, among other entries and blanks for recording information about the case. With the exception of that last entry by Judge Foster, the information contained on the form obviously was recorded by another judge or clerk's office employees. (Resp. App. 20). Hall's case never was called in open court. Saunders recalled arriving at the courthouse and learning about Hall's death, but most likely from a clerk, not in court, and not from any judge. Mickens v. Greene, 74 F. Supp. 2d at 613-614. Three days later, on Monday, April 6, 1992, Judge Foster appointed Saunders to represent Mickens.



Mickens' case suggests even less reason to inquire into possible conflicts than the circumstances of a multiple representation.

Mickens also failed to demonstrate that the juvenile judge should have known of any "particular conflict." He argued below that Judge Foster must have been aware of publicity concerning Hall's murder, and he asserts that the ***juvenile*** court judge should have recognized the likelihood that Mickens' defense in a capital murder penalty phase proceeding in the ***circuit*** court would require countering evidence about the victim and victim impact evidence.[14] These might be matters that could be attributed to the knowledge of a ***trial*** court in an appropriate case because trial courts do have the opportunity to become familiar with the allegations and evidence in pre-trial proceedings and may have experience in capital murder trial and sentencing procedures. But a juvenile court's exposure to a criminal case in the circumstances presented in Mickens' case is too limited to presume familiarity with facts and legal proceedings far beyond that judge's experience.

Mickens failed to present ***any evidence*** of the juvenile judge's exposure to publicity, and the juvenile court judge, as a matter of law, never would be involved in a capital murder sentencing proceeding. It is not even plausible to hold a juvenile court judge responsible for forecasting what evidence that defendant might choose to present in a circuit court trial if, in fact, the case ever proceeds to a sentencing phase. And it would have required remarkable prescience for Judge Foster to be able to predict that years after her involvement in Mickens' case, the Virginia General Assembly would enact legislation allowing the use of victim impact statements

[14] The district court accepted these reasons in concluding that Judge Foster had a duty to inquire into the possibility of a conflict. Mickens, 74 F. Supp. 2d at 614. To the extent that these reasons represent findings of fact, the Respondent asserts, as he did below, that they were "clearly erroneous."

for the final judge-sentencing proceeding, 1993 Va. Acts of the General Assembly, Chapter 978, and permitting victim family testimony. 1998 Va. Acts c. 485.[15] The juvenile court judge's limited involvement in Mickens' case provided no opportunity for that judge reasonably to have known of any "particular conflict," and Mickens' failure to prove circumstances that would have required an inquiry independently defeats his Wood v. Georgia claim.

### *E. Mickens Has Failed To Identify Any Division Among The Federal Circuits Or State Courts Concerning Applications Of Wood v. Georgia That Compels Review In His Case.*

Even if Mickens' "split" argument had force, it could do nothing to convert his defaulted, fact-bound and fact-precluded claim into a "cert-worthy" legal issue. However, even his "split" argument is groundless. Mickens asserts that the decision of the *en banc* majority holding that Mickens must demonstrate that an actual conflict of interest adversely affected his lawyer's representation, is in conflict with decisions of other federal courts of appeals and state courts addressing similar issues. The conflicts in authority that Mickens identifies are either non-existent or based on circumstances completely inapposite to Mickens' case.

The Second Circuit has applied Wood and Sullivan as stating a rule of automatic reversal whenever a trial court fails to conduct an inquiry where it has sufficient notice of a "possible conflict." See United States v. Rogers, 209 F.3d 139, 143-144 (2d Cir. 2000) ("When a possible conflict has been entirely ignored, reversal is automatic."); Ciak v. United States, 59 F.3d 296, 304 (2d Cir. 1995). The Second Circuit's rule requires reversal without regard to whether the defendant can show an "actual conflict" ***or*** an "adverse effect." See Rogers, 209 F.3d at 144, 146.

Of course, neither Sullivan nor Wood announced a rule of automatic reversal for failure to inquire into a "particular conflict" much less the mere "possibility" of a conflict. Sullivan explicitly stated that the trial court is not obligated to inquire into every possibility of a conflict. 446 U.S. 346. And Wood did not apply the "mandated reversal" rule the Second Circuit mistakenly attributes to Sullivan. Additionally, to the extent that the Second Circuit would do away with any requirement that a defendant show an "actual conflict," its rule ignores even the new standard Mickens and the Fourth Circuit dissenting judges discern from the remand order in Wood.[16] The Second Circuit's rule appears to be in direct conflict with Sullivan and Wood, and stands alone among the other authority Mickens has collected. That conflict between the Second Circuit and this Court, however, certainly provides no reason for the Court to review the ***Fourth Circuit's*** correct application of this Court's precedents. If the Court determines that it should flesh out conflict of interest law in any manner, it should select a case on direct appeal from a circuit such as the Second where the clear holding in Sullivan has been so altered.

Mickens' argument that the Fourth Circuit's decision is at odds with Atley v. Ault, 191 F.3d 865 (8th Cir. 1999), moreover, is simply wrong. Atley quotes footnote 18 from Wood, but because the case involved the adequacy of the trial court's resolution of the trial attorney's motion

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[15] Although Payne v. Tennessee, 501 U.S. 808 (1991), pre-dated the juvenile court's involvement in Mickens' case, the Virginia Supreme Court did not approve the admission of such evidence in a Virginia trial until November 1994, after Mickens' trial. See Weeks v. Commonwealth, 450 S.E.2d 379, 389 (Va. 1994). Of course, the Commonwealth did not present victim impact evidence during the 1993 sentencing, and only the victim impact statement required by the intervening change in state law was presented in the final judge sentencing in 1996.

[16] Mickens also cites United States v. Malpeidi, 62 F.3d 465 (2d Cir. 1985) as an example of a Second Circuit case where the court reversed on the basis of an "actual conflict" without a showing of adverse effect. Malpeidi, however, presented only a straightforward Sullivan claim, alleging a conflict of interest, and the court found no "lapse in representation," apparently meaning "adverse effect." Id. at 469.

to withdraw because of a conflict, Atley definitely is a Holloway case. 191 F.3d at 871 ("the issue before this Court is whether the Iowa Supreme Court's ruling on the adequacy of the trial court's inquiry constitutes a reasonable application of the rule announced in Holloway). Atley simply does not address the potential conflict in Mickens' case.

As Mickens acknowledges, the Seventh Circuit decisions offer several formulations of a standard for similar conflict claims, some of which presume prejudice if a trial court fails to inquire into a possible conflict after receiving notice. None of the cases Mickens cites, however, were resolved in a manner inconsistent with the decision of the Fourth Circuit. See Cabello v. United States, 188 F.3d 871, 875 (7th Cir. 1999) (trial court was not aware of potential conflict in undisclosed third party fee arrangement; no prejudice to representation shown); Lipson v. United States, 233 F.3d 942, 946 (7th Cir. 2000) (trial court not on notice of fee paid by another; lawyer gave Lipson adequate representation); United States v. Pergler, 233 F.3d 1005, 1010 (7th Cir. 2000) (trial court adequately investigated notice of potential conflict); Holleman v. Duckworth, 155 F.3d 906, 911 (7th Cir. 1998) (uncertain claim of conflict of interest remanded to district court for hearing); United States v. Shorter, 54 F.3d 1248, 1253 (7th Cir. 1995) (presumption of prejudice if defendant shows possible prejudice after trial court fails to inquire into possible conflict); United States v. Horton, 845 F.2d 1414, 1418 (7th Cir. 1988) (no claim of conflict presented to trial court; claim addressed under Sullivan and no conflict or adverse effect); United States v. Fish, 34 F.3d 488, 492 (7th Cir. 1994) (objection raised at trial and court conducted adequate inquiry).

The Ninth Circuit decision Mickens cites actually confirms the Respondent's position. In Garcia v. Bunnell, 33 F.3d 1193 (9th Cir. 1994), the court considered a federal habeas petitioner's claim that the trial court had failed to conduct an adequate inquiry into the possible



conflict of interest reported by his attorney to the trial court. Although the Ninth Circuit determined that the trial court should have conducted an inquiry, it denied relief because the prisoner had received an evidentiary hearing in federal court in which it was established that no actual conflict existed, and there was no suggestion the representation was "influenced." Id. at 1199-1200.[17]

Mickens concedes that the decision in his case is in accord with decisions of the First, Tenth, and Eleventh Circuits. See Mountjoy v. Warden, New Hampshire State Prison, ___ F.3d ___, 2001 U.S. App. LEXIS 5442 (1st Cir. 4/3/2001); United States v. Winkle, 722 F.2d 605, 611-612 (10th Cir. 1983); Freund v. Butterworth, 165 F.3d 839 (11th Cir. 1999) (*en banc*). Indeed, the decisions in Winkle and Mountjoy involve reasoning and results remarkably similar to Mickens' case. In Winkle, the Court remanded the case for a hearing to determine whether the defendant could show that an actual conflict adversely affected his defense in response to the claim that the trial court failed to inquire into a conflict that was brought to the court's attention. Winkle, 722 F.2d at 611-612. And in Mountjoy, the First Circuit reaffirmed its rule that "in light of Wood, automatic reversal is not required if a trial judge holds a post-trial hearing about whether an actual conflict developed that adversely affected counsel's performance, the standard for reversal under Sullivan." 2001 US App LEXIS 5442 at *18.[18]

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[17] Mickens also points to several state court direct appeal cases in which the courts identify mandatory reversal rules based on Sullivan and Wood when a trial court fails to inquire into a possible conflict and an actual conflict can be shown. (Pet. 21-23). However, creating and even applying such rules on ***direct appeal*** is not in conflict with the decision in this federal habeas corpus case.

[18] The First Circuit, like the Fourth Circuit *en banc* majority, previously concluded that the remand in Wood for a hearing contradicted an automatic reversal rule. See Brien v. United States, 695 F.2d 10 (1st Cir. 1982).

Thus, contrary to Mickens' argument, there are few and minor variations among the circuits and States concerning the standard for assessing Wood claims. Those variations consist, at most, in subtle differences in ***describing the standards*** this Court has announced, not ***in applying differing standards to produce inconsistent results***. Obviously, Mickens has grossly exaggerated his claims of conflicting authorities, and he has failed to suggest any need for this Court to grant review in Mickens' case to resolve any substantial conflict in the application of federal law.

## II. MICKENS' ARGUMENT THAT THE FOURTH CIRCUIT ERRONEOUSLY REJECTED HIS CLAIMS OF "ADVERSE EFFECT" DOES NOT MERIT THIS COURT'S REVIEW.

### *A. The Circuits are in Essential Agreement in the Understanding of an Actual Conflict Adversely Affecting Counsel's Representation.*

The court below applied the Fourth Circuit's established standard for assessment of an "adverse effect:"

> A defendant has established an adverse effect if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another. Thus, both taking action and failing to take actions "that are clearly suggested by the circumstances" can indicate an adverse effect.

Mickens, 240 F.3d at 360 (citations omitted). The *en banc* majority further approved the district court's three-part analysis that focused particularly on the circumstances of a successive representation:

> First, the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision....[T]he petitioner must show that the alternative strategy or tactic was "clearly suggested by the circumstances." Finally, the petitioner must establish



> that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict

Mickens, 240 F.3d at 361 (internal citation omitted).

Mickens argues that the final requirement of this test is inconsistent with the law of every circuit but the Eleventh Circuit.[19] He asserts that obligating a petitioner to prove a "link" between the alleged conflict and counsel's failure to pursue the strategy imports a subjective inquiry into counsel's motivations. Mickens thus misstates the decision below in order to claim a split among the circuits that simply does not exist.

Mickens concedes as he must that Sullivan's test of an actual conflict of interest that adversely affected the attorney's representation, 446 U.S. at 348-349, by definition requires a "link." "This is implicit in the very concept of adverse *effect*." Pet. at 33. And every decision from the courts of appeals that he mentions recognizes a "link" requirement. See United States v. Fahey, 769 F.2d 829, 836 (1st Cir. 1985) (the plausible strategy not pursued must be "inherently in conflict" or "not undertaken due to the attorney's other loyalties or interests");[20] Lipson v. United States, 233 F.3d at 946 (petitioner must "suggest something that he did that he should not have done, or something that he failed to do that should have been done, that had a negative impact" on petitioner's case); United States v. Migliaccio, 34 F.3d 1517, 1526 (10th Cir. 1994) (adverse effect demonstrated if "a specific and seemingly valid or genuine alternative strategy was available to defense counsel, but it was inherently in conflict with his duties to

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[19] The district court and the *en banc* majority adopted the three-part analysis the Eleventh Circuit set out in Freund v. Butterworth, 165 F.3d at 860.

[20] Mickens notes that Fahey also has been adopted as the standard for adverse effect in the Second and Third Circuits. See United States v. Morelli, 169 F.3d 798, 810 (3d Cir. 1999); Winkler v. Keane, 7 F.3d 304, 309 (2d Cir. 1993).

others or his own personal interests"); United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992) ("the defendant need only show that some effect on counsel's handling of particular aspects of the trial was 'likely.'").

The Fourth Circuit's statement of a requirement that counsel's failure to pursue an alternative strategy must be "linked" to the alleged actual conflict is not different than saying that counsel's failure to pursue a strategy was "inherently in conflict with," or "due to" his diverging interests. Mickens has argued that the Fourth Circuit applied the "adverse effect" standard to conduct an inquiry into defense counsel's subjective "motivation," but the record does not support that allegation.[21] And notwithstanding Mickens' erroneous argument that the Fourth Circuit misapplied its own standard, the "adverse effect" requirement of a "link" between the effect and the conflict is not inconsistent with any circuit authority Mickens presents. Thus, Mickens' case fails to present any important issue of federal law which has divided the circuits.

[21] Mickens attempts to reduce the *en banc* majority and district court's findings of no "adverse effect" to the statements that Saunders had not perceived any ethical conflict in representing Mickens and "did not refrain from taking any actions" because of his prior representation. Mickens v. Greene, 74 F. Supp. 2d at 606, 612. Neither of these statements, however, was relied upon by the courts below as the evidentiary basis for rejecting Mickens' asserted "adverse effect." The district court's determination that Saunders did not perceive an ethical violation certainly was relevant to Mickens' assertion that Saunders possessed a conflicting personal interest. Because Mickens asserted a conflict based on Saunders' motivation to conceal ethical lapses, the district court appropriately determined that Saunders did not in fact recognize such ethical lapses much less act on them. Mickens v. Greene, 74 F. Supp. 2d at 605-606. Mickens' further argument that the courts below also erroneously relied on Saunders' credibility in rejecting the claim of an "actual conflict" in failing to investigate Hall's background is factually incorrect. This alleged conflict was found insufficient without regard to Saunders' testimony. See pp. 18-21. More significantly, it has nothing to do with an alleged split of authority concerning the adverse effect standard.



### B. *The Fourth Circuit Correctly Found that the Alleged Conflict of Interest did not Adversely Affect Mickens' Case.*

Mickens argues that the Fourth Circuit erroneously relied on a trial record produced by "conflicted" counsel in rejecting his claimed "adverse effects," and that the court below effectively required that the adverse effect also must amount to attorney incompetence. Again, Mickens misstates what the courts below decided. The Fourth Circuit upheld the district court's factual findings as "not clearly erroneous" and agreed with the district court that Mickens' assertions of an "adverse effect" were inadequate in several instances because he failed to present viable alternative defense strategies, and the viable strategies Mickens had identified bore no connection to the alleged conflict of interest. Mickens, 240 F.3d at 362.

The district court rejected Mickens' claims concerning counsel's failure to investigate and present a "consent defense" because it was not a viable defense. The evidence established that Hall had been subjected to a choke-hold and stabbed 143 times before or during the attempted sodomy while laying on his stomach bent over a mattress. Mickens personally denied ever meeting Hall and never suggested any support for a defense of consent. Mickens v. Greene, 74 F. Supp. 2d at 606-607. The Fourth Circuit upheld these factual findings as not clearly erroneous. Mickens, 240 F.3d at 361.

Mickens' argument that the district court and Fourth Circuit improperly relied on his own testimony as a basis for rejecting the claimed adverse effect is puzzling and wrong. Of course the district court properly considered Mickens' testimony in determining whether a factual basis

existed that could make "consent" a viable alternative strategy. Mickens' testimony, which confirmed what Mickens told his lawyers, ***established that he could not claim consent***.[22]

Mickens also challenges the Fourth Circuit's conclusion that "[c]hoosing not to vilify the mother of the victim cannot be the mark of incompetent counsel by any measure." Mickens, 240 F.3d at 362. He appears to assert that this statement rejects the "adverse effect" claim because it would not otherwise state a claim of ineffective assistance of counsel. In fact, the Fourth Circuit upheld the district court's factual findings that a strategy of negative attacks on Hall or his mother simply was not a "reasonable alternative strategy or tactic," Mickens v. Greene, 74 F. Supp. 2d at 608. See Mickens, 240 F.3d at 362. More significantly, the Fourth Circuit also expressly upheld the district court's findings that unconflicted co-counsel "was primarily responsible for the sentencing hearing, was aware of this [negative] information, and made the decision not to use it at the sentencing hearing; so this strategic decision was unrelated to Saunders' conflict of interest." Mickens, 240 F.3d at 362.[23]

The district court's factual findings, upheld by the Fourth Circuit, establish that Mickens

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[22] Mickens' disturbing suggestion that unconflicted counsel might have persuaded Mickens not to testify, and then have argued "consent," seems to imply that defense counsel should pursue defenses entirely contradicted by their client's own statements. That certainly is not consistent with this Court's stated understanding of counsel's duties. Strickland, 466 U.S. at 691. In any event, as the courts below found, the facts of the murder did not make consent a viable alternative strategy.

[23] Mickens' claim that a conflict prevented Saunders from using "consent" to persuade the prosecutor to offer a plea bargain correctly was rejected. The uncontradicted evidence demonstrated that the prosecutor would not plea bargain Mickens' case. Mickens v. Greene, 74 F. Supp. at 609. There was no evidence of consent. Moreover, the so-called "confidential information" about Hall's prior juvenile charges had been fully exposed in the local newspaper, and hence was not a bargaining point.



failed to demonstrate any adverse effect, and these findings present no compelling reason for review as this Court previously has made clear in similar circumstances:

> Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case. Nevertheless, when the lower courts have found that a lawyer has performed his or her solemn duties in such a case at or above the lower boundary of professional competence, both respect for the bar and deference to the shared conclusion of two reviewing courts prevent us from substituting speculation for their considered opinions. The district judge, who presumably is familiar with the legal talents and character of the lawyers who practice at the local bar who saw and heard the witness testify, is in a far better position than we are to evaluate a charge of this kind, and the regional courts of appeals are in a far better position than we are to conduct appellate review of these heavily fact-based rulings.

Burger v. Kemp, 483 U.S. at 785. Because the factual findings establish the absence of an adverse effect, and under the correct standard, the Court should not grant certiorari to review Mickens' "adverse effect" arguments.

## CONCLUSION

The application for a stay of execution and petition for a writ of certiorari should be denied.

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# RESPONDENT'S APPENDIX

## RESPONDENT'S APPENDIX


Newspaper article (4th Cir Joint Appendix 2081-2082).....1

Commonwealth's Exhibit 4a (Mickens I Joint Appendix 369).....3

Commonwealth's Exhibits 3A-3E (Mickens III Joint Appendix 151-155).....4

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"We will build the right facilities at the right time," DuVal said during a ceremony to kick off the 1992 Education Fair at Patrick Henry Mall. "We'll build them when they're needed and where they're needed."

the board adopts that capital plan. He said it contributed to the "principle" of building facilities when needed.

The mayor also said the councilmen are committed to "do our part at the local level" to fund the academic programs needed in Newport News. The School Board recently adopted a $140 million budget for the upcoming year that would require an additional $2.76 million in local funds, but the budget must be approved by the council. City Manager Edgar E

ceremony by incoming Superintendent Eric J. Smith, who begins work April 13. Smith was in town from Danville, where he has been superintendent for two years.

Smith told the 150 or so people in the crowd at Patrick Henry Mall that one of the most important factors in ensuring a suc-

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# Quest ends in death

A mattress sat Tuesday under a concrete slab that juts out from behind the former Basic Construction Co. at 29th Street and the James River in Newport News. The body of a 17-year-old male was found there Monday.

Bobby Harris Daily Press

## Teen sought a home, normal life, friends say

By Cheryl L. Rose
Daily Press

NEWPORT NEWS

Trying to eke out a normal life as a homeless teen-ager, 17-year-old Timothy Hall hung out with neighborhood teens and slept on friends' couches.

What didn't fit in as normal, friends say, were the mysterious appointments he kept. Though his friends never pressed for an explanation, now they think one of those liaisons led to his stabbing death.

"He had the attitude he was going to live forever," said Alicia Thrash, whose 18th birthday party Hall was to attend Saturday night. He never arrived.

Friends say Hall had promised to go to the party — after he met with someone he never named.

Hall was not seen or heard from until his body was discovered Monday afternoon along the rocky shoreline near 29th Street. A man found Hall underneath a concrete slab that juts out from behind the former Basic Construction Co. building, police said. Hall's partially clothed body was found face down on a tattered mattress beneath a piece of plywood, police say.

On Tuesday, seven of Hall's closest friends skipped school and gathered to talk about the murder and the events in their friend's life that may have led to his death.

One thing that angered his friends was that people might think Hall was a homosexual because his body was found in a place where male prostitutes frequent.

"He wasn't gay," Trina Hall adamantly said. "He was mellow. I know he owed some old friends some money, but I can't think of any reason why someone would want to do that to him."

Adults who often fed Hall describe him as homeless because he depended upon their generosity and never knew whether he was welcome at his mother's house. He spent his life living with a series of foster parents, his adult sister, other relatives and friends. Because he roamed around so much, he wasn't able to collect a Social Security check until recently when he listed a friend's house on 28th Street as his permanent address.

The checks hadn't started arriving, the friends said, but suddenly Hall had money — and excuses.

Alicia Thrash said Hall would be at her house and would suddenly say he had to leave.

"He would get up for a couple of hours and come back," she said. "He would say he was broke, then he would come back and have money. And he started having new things, like new shoes."

About the same time, she said, Hall

Please see Teen/B7

## Death came in a cold, distant place

By David Chanatry
Daily Press

NEWPORT NEWS

Underneath a mass of concrete behind the old Basic Construction Co. building at the end of 29th Street is a world removed from comfort.

Vagrants, wimos, street people, drug addicts, prostitutes and runaways frequent the area, according to people who live nearby.

Vagrants use the lot and its crevices as shelters to escape the elements, residents claim.

"They live under there, different street people," said Florence White, who manages the nearby St. James Terrace Apartments, a 100-unit brick complex on the adjoining lot.

The body of 17-year-old Timothy J. Hall was found on a blood-soaked mattress in one of the crevices Monday. He had been stabbed to death.

Peace symbols, the words "Love" and "Peace" and other graffiti, including a message "Do You Want to Die," are scribbled

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## Case was c
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By Mathew Paust
Daily Press

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## Brown turns contributors into campaign agent

2061

RESP. APP. 1

...International Airport on Tuesday. Two years ago Caroline, a student at Denbigh High School, stayed with Birgit in Germany. They have been pen pals since then.
Bobby Harris/Daily Press

outsider. They point to Brown's recent fund-raising activities as chairman of the Democratic Party in California, where he raised mil-

work with Mother Teresa and the poor in India.

"It amazed me that any politician would humble himself to feed and

"I ... he's ... inside, and he ... it went again... he's speaking ... said.

## Spencer

Continued from B1

"I had been working at a bank and going to school part time," she said. "I wanted to go back to school full time. I met someone who told me about engineering."

Three-and-a-half years later Martinez had an engineering degree from Old Dominion University.

She doesn't think girls of today should have to wait as long as she did to discover the interesting and lucrative careers available in math and science. So she started "Bridges to Tomorrow."

"I don't think it's because of genetics that only 5 to 10 percent of engineers are women," Mart'nez said. "You have to have poten tial. Parents play a major role. Kids n ed motivation."

The best motivator, Martinez decided, was to show girls what they could do with ...

"Girls are ... said, "because ... models."

On April 23 ... they will.

*Registration ... to Tomorrow: ... matics and Sci... tributed this w... middle school ... school teachers ... For further ... 583-8121.*

## Teen

Continued from B1

stopped accepting money from friends.

"I think that maybe he was hustling some guys. He just picked the wrong guy," she said, adding that she thought he was having sex with men for money but preferred women. She said he was dating one of her closest girlfriends.

Police told the family Hall lived with that his death was sexually related, Alicia said. Police have refused to comment about the case and say they don't have any suspects, but sources say Hall died from multiple stab wounds.

Whenever friends teased Hall about having sex with men, he'd deny it, Alicia said.

"He was ashamed about it but desperate and needed to get by," she said. "Sometimes he would get depressed and desperate. He would be crazy. The pressure was driving him into the ground."

About two weeks ago, things seemed to be changing for Hall, say those who helped him.

"He was trying to get his life together," said Bernard Gordon, with whom Hall had been staying. On Monday, the day his body was found, Hall was scheduled to go to Busch Gardens in Williamsburg for a job interview, Gordon said.

"He was a normal kid. He watched TV and videos," Gordon said, as he stood in his polo blue pajamas in the foyer of his 28th Street apartment hours after he learned about Hall's death. He said Hall spent most of his days at the apartment, but a social worker was about to place him in a program at a local school.

"He was nice looking, clean cut," Gordon said, describing Hall as having blond hair and blue eyes. "He was very observant. He noticed everything."

Gordon said he last saw Hall when the teen left the apartment Saturday night. Gordon said he thought Hall had gone to the party with his son, Raheem. "I didn't pay any attention when I woke up Sunday and he wasn't here. I thought he was at his mother's house.

"Every time I heard the door open, I thought it was him," Gordon said. Finally, on Monday, Gordon said he asked a family friend to go to Hall's mother's house.

Alicia's mother, neighbor Barbara Roberson Thrash, said she allowed Hall to sleep on her couch if he got locked out at Gordon's. She fed him whenever he was hungry.

"He was quiet and easy going — not any trouble," Thrash said. "He just didn't have what a child that age needed."

"He said his mom threw him out," she said.

Friends said Hall's mother was going to school to become a nurse and was taking care of her husband, who had cancer. Hall's father is dead, friends said.

Two weeks ago, Alicia said, Hall's outlook lightened. He told her that he was going to live with a relative in Florida as soon as he finished high school.

"He was so happy, so carefree. He was finally going to have a chance at a normal life," said Thrash.

"But the last week before he died, he had such a short temper — a short fuse if you said something he didn't agree with," she said. "Then he would up and disappear a lot. He'd just and wouldn't come back."

She and other teen-agers said they thought Hall's behavior was bizarre but dismissed it as "one of his moods."

"He was tired of always roaming around and never having a house," Thrash said.

And there were other incidents, his friends said.

Several weeks ago, Hall and his mother got into an argument and he pushed her out of his way, Alicia said. "Tim's mother put a violation out on him," she said.

When the police picked him up, Hall was carrying a gun, she said. As a result, Hall was ordered to spend a week in Gordon's apartment, Alicia said.

Hall started carrying the gun, she said, after two former classmates from Kecoughtan High School confronted him in front of Thrash's apartment on 28th Street and demanded money that he owed them.

"He grabbed a butcher knife and a hammer with an ax on the top and put them in his coat. Then he went downstairs to meet them," Alicia said. "He said: 'I'll be back.'"

But Alicia didn't see Hall until the next day when he called and told her: " 'I scared the guys away,' " she said.

Alicia and Hall's other friends don't believe those two men were responsible for his death. Instead, most said, they think Hall's desperate attempt to have a normal life eventually entangled him in one that promised quick cash and minutes of discomfort.

"We're feeling guilty, quiet and grieved. Murderously angry," she said. "If we find the guy that had something to do with this, it's going to be a battle of who gets him first — the cops or us."

## Place

Continued from B1

on the underside of the concrete slab that forms a parking deck.

Two years ago, White said she used to see the same five or six people. She surmised they were alcoholics and even had a name for them.

She called the group "The Hole in the Wall Gang."

"They would hang around and drink themselves into oblivion," she said.

On several occasions, White took some of the people to the hospital for emergency treatment, including one who had cut a thumb.

"We just kind of tolerated them because I guess I never felt they were a danger to me or anybody else," she said.

In the last two years, however, after several of the original vagrants died, White said she's noticed a different breed of street person.

More drug addicts, she claims.

White and other residents have found discarded needles amid

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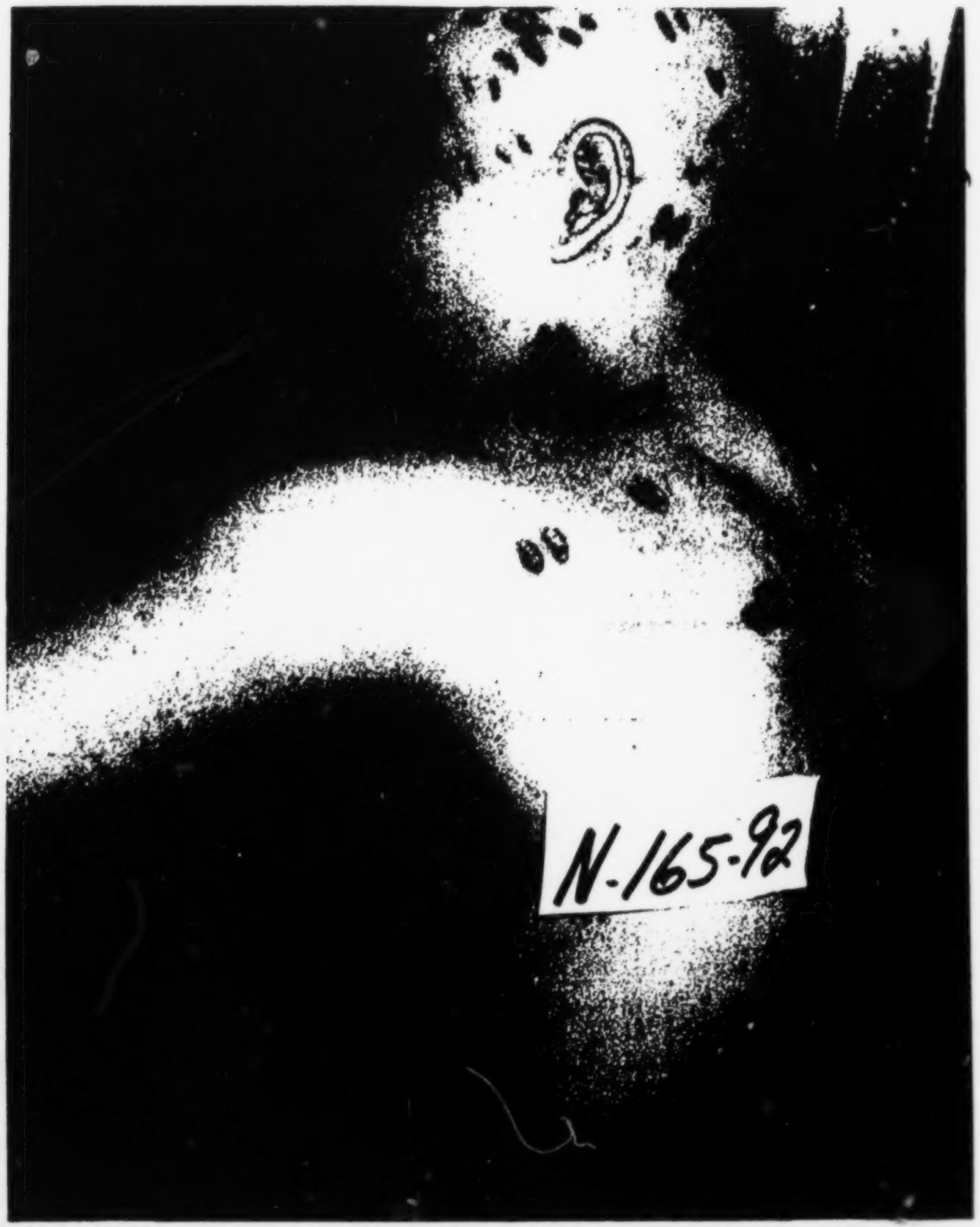
RESP. AIR. 2.

RESP. APP. 3

RESP. APP. 4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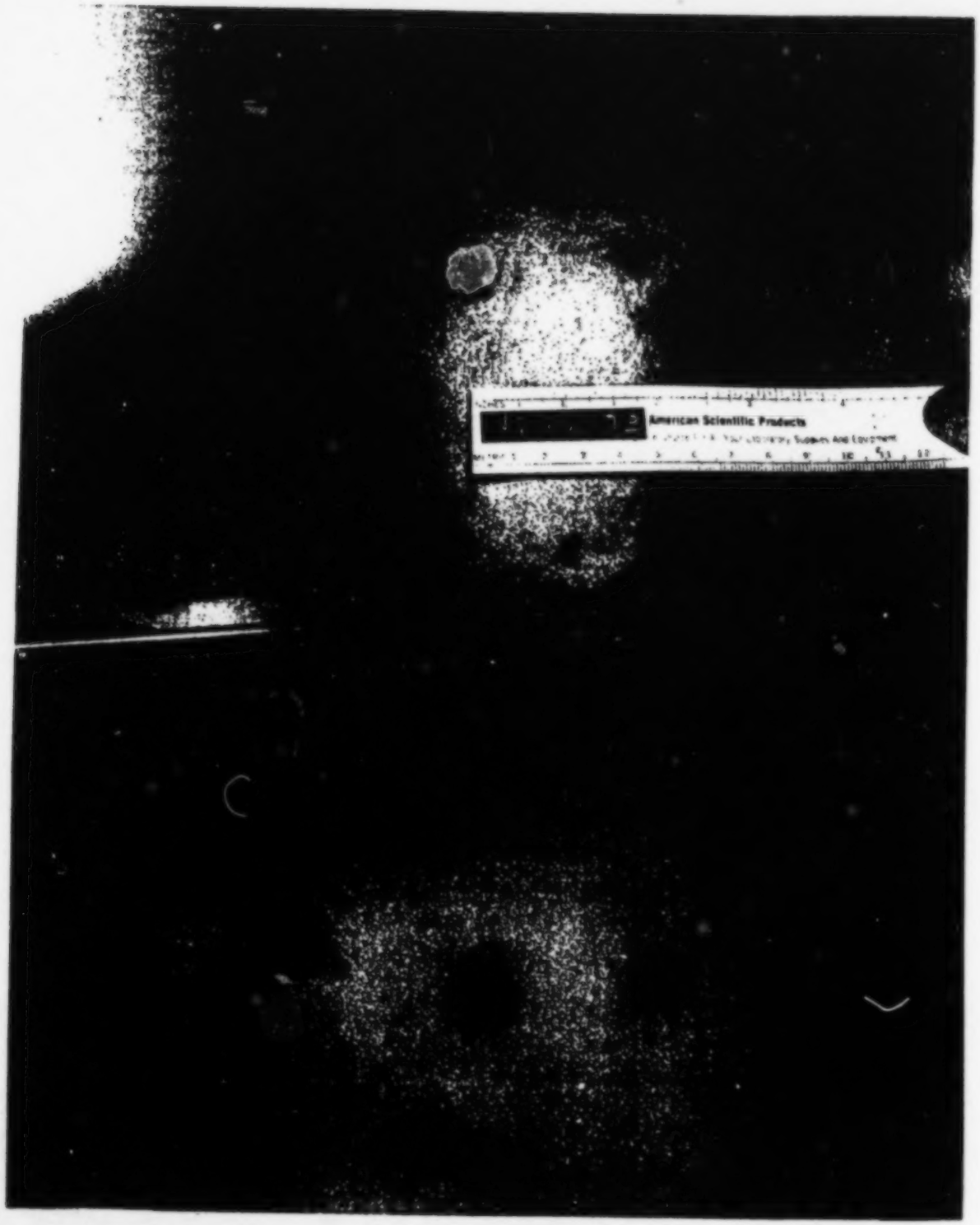
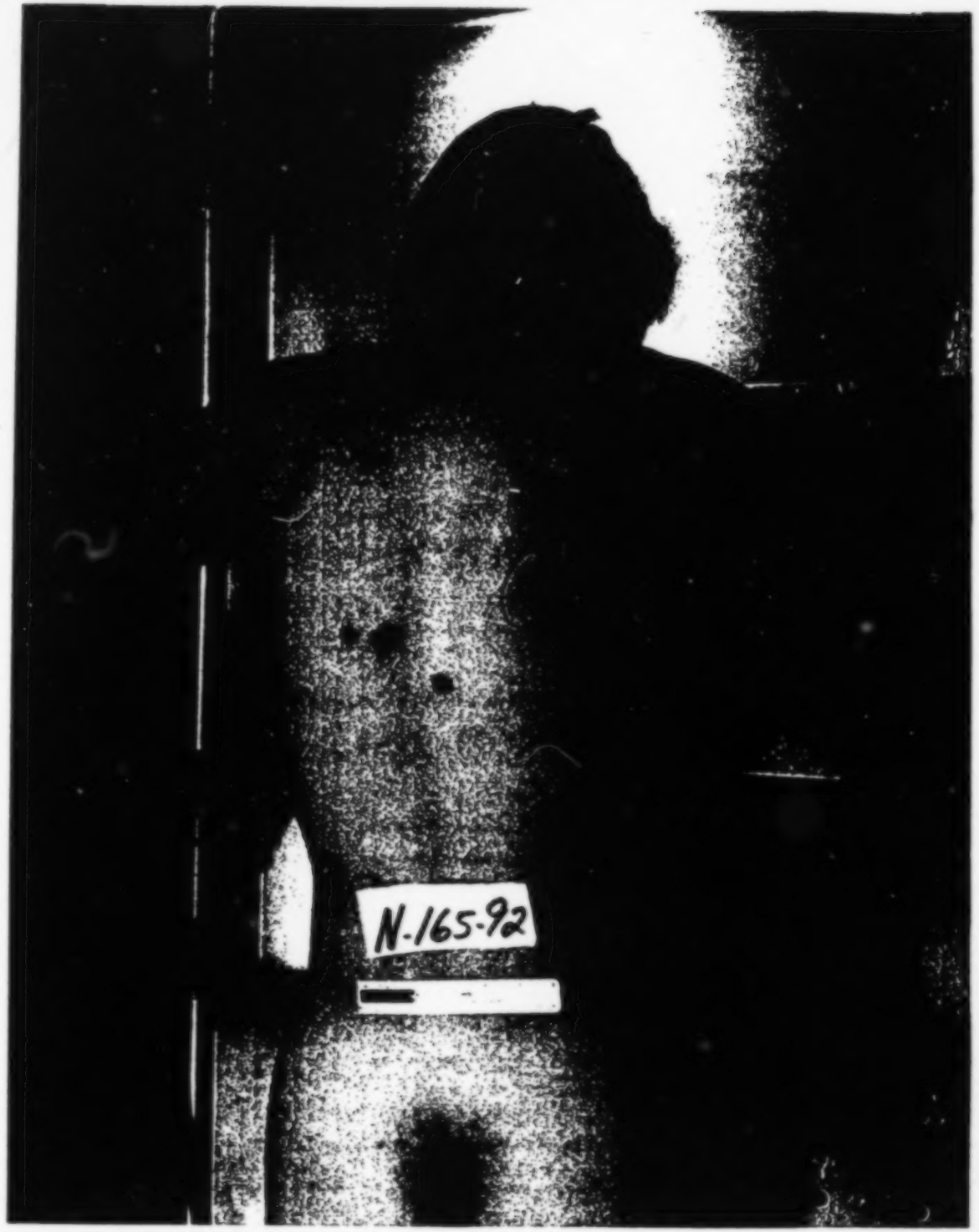

American Scientific Products

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murder scene is under that.
Q. Have you actually been to the location where the body was found?
A. Oh, yes.
Q. Can you tell us how you get to that location?
A. You have several ways of getting to that location. I walked it the way --
THE COURT: Excuse me. Is it any different than you testified to on direct about the several different ways you could get to it?
MR. HARRIS: That was Mr. Keeling, Your Honor.
THE COURT: Oh, Keeling. I'm sorry. Thank you. I'm sorry, Mr. Harris.
A. I walked it from the -- in the same manner that the gentleman who found the body did, which means that you have to go down to -- actually I don't think the street is shown on here. 22nd, 23rd Street, and go down to the river and then walk up the shoreline. You can get down by dropping off the bank, but --
THE COURT: Is 22nd, 23rd Street, is that where those big barges are parked down there as the road turns?
THE WITNESS: Yes, sir, that's where they are at.







THE COURT: What kind of barges are those?
THE WITNESS: I'm not sure.
THE COURT: Or ships.
THE WITNESS: I'm not sure what they are, Your Honor. I know what ships you're talking about.
THE COURT: The big gray ships?
THE WITNESS: Yes, sir.
THE COURT: And then you go down there to the river and walk around and up back west towards Richmond, right?
THE WITNESS: That's correct, Your Honor. And you can walk down the shoreline to there or a couple blocks further west towards Richmond which is not shown on this, there are a set of steps leading down to the river.
BY MR. HARRIS:
Q. The diagram shows 29th Street leading up to the Basic Construction building?
A. That's correct.
Q. Do you recall at what numbered street the steps would be?
A. It might be 30th, it might be 31st or 32nd Street. All I know is -- I didn't know they were there until I walked. I wasn't going to climb up the bank, and I just kept walking, and there they were, so I came up

the stairs.
BY MR. HARRIS:
Q. You testified earlier concerning your recollection that you had some information that the victim would sit on the riverside on occasion, that he had gone down there on prior occasions?
A. Where it came from, when I got it, I don't recall, but that's the information I had.
Q. And you were asked whether or not you made any attempt to contact the victim's girlfriend to verify that information; is that correct?
A. That's correct, I was asked that.
Q. Do you have any reason to believe that the victim's girlfriend would talk to you when you're representing the man charged with killing her boyfriend?
A. I can't answer that question. I don't know whether she would or not.
THE COURT: Good for you.
Q. If I can ask you generally about this high crime area. On the diagram that you have in front of you, is any part of the map area or prostitution area that you were ever familiar with reflected on this map?
A. Sir, I have represented some prostitutes in the past and they hand them the map. I don't look at it.



RESP. APP. 11



times, is W-O-S-K-O-B-O-N-I-K, one word. It's a last name.
Q. After you were appointed and Mr. Saunders were appointed to this case, did the two of you ever meet and set down and decide who was going to investigate the case?
A. We both investigated it. I don't recall what decision we made. We didn't make a decision that I was going to investigate it and he wasn't or vice versa.
Q. So is it your belief that both of you were investigating?
A. That's my belief.
Q. Both the defense and the guilt phase and the possible evidence for sentencing?
A. I think initially; although, I also recall telling Mr. Saunders that I would take the family. They would call me, and I would have them come to my office, keep them informed because early on we knew that Mr. Saunders was going to do the trial. And if Mr. Mickens is found guilty, then I would be presenting evidence in way of the family and whatever else we could get for the sentencing phase.
THE COURT: So basically Saunders investigated the guilt-phase questions, and you



RESP. APP. 12

investigated the sentencing-phase questions. Is that what your answer means?

THE WITNESS: Yes, Your Honor.

Q. Did you also investigate the guilt phase issues?

A. Yes.

Q. Did you go out and talk to witnesses that might know something about the crime, the murder of Timothy Hall?

A. I talked to -- I can't call them witnesses because I didn't get anybody to tell me anything, anything definite, but yes, I did go out and ask people. And there's a Corner Store there that would have been mentioned in the deposition, that I had gone in a couple of times to see if anybody knew Timmy Hall, but I didn't get any results from that. And the reason I went there is because he lived pretty much across the street.

Q. In that part of downtown Newport News there was a nearby store?

A. Something like the Corner Store or Corner Grocery or something to that effect.

Q. How many times did you go there?

A. Several times.

Q. Did you speak to any other witnesses in the neighborhood who might have known Timothy Hall?







A. I talked to -- I think it was the father of the family that he was living with. I think that was way in the preliminary hearing.

Q. Would that be Bernard Gordon?

A. Yes, the Gordon family. Rashad Gordon's father, I believe.

Q. Is Mr. Gordon the witness who died before trial? If you recall?

A. I don't recall him dying, but there was another witness who died. He was a person who had gotten some tennis shoes, and I can't think of his name right now.

Q. I'll move on. As far as the evidence of this newspaper article that you've been shown that talks about the finding of a body and the discussion with people who knew Timothy Hall, that is undated in the record.

Do you know about when that was in relation to the time of the crime?

A. No, I don't, but I would presume it was in April of that year. The article, itself, had comments from others who were adamant that he wasn't a homosexual.

Q. Well, let me ask you about this: You had information, then, from this newspaper article -- I take it you saw this newspaper article soon after you were appointed?

A. Correct.
Q. Even if it had actually been published before you had been appointed to represent Mickens?
A. Correct.
Q. And based on that information in the article, did you conduct any investigations at all to try to determine whether or not Timothy Hall was a male prostitute or a homosexual?
A. Yes.
Q. What did you do?
A. I talked to a lady at church, and I went to the Corner Store a number of times to ask people if they had known Timmy Hall. I just basically said who I was, and I was working on that particular case.
Q. And you mentioned you talked to the father of the family where he was living?
A. Right.
Q. Did that man indicate to you in any way --
MR. WAGNER: Can we have a time frame, please?
MR. HARRIS: I'm sorry?
MR. WAGNER: Can we have a time frame, please?
THE WITNESS: I believe at the day of the preliminary hearing is my recollection is when I



RESP. APP. 15



talked to Mr. Gordon about Timmy Hall.
BY MR. HARRIS:
Q. Did you have any indications from Mr. Gordon that Timothy Hall was homosexual?
A. No.
Q. Or a male prostitute?
A. No.
Q. That he used drugs?
A. I didn't get that from Mr. Gordon.
Q. That he drank?
THE COURT: Let's go back. The series of questions was what efforts you made personally to determine whether he was or wasn't a male prostitute.
Did you talk with Mr. Gordon about whether he was or wasn't a male prostitute at the preliminary hearing?
THE WITNESS: Yes.
THE COURT: What did Mr. Gordon tell you?
THE WITNESS: To his knowledge he said Timmy wasn't. Your Honor, Mr. Hall had moved in and lived in his house, but he hadn't been there what I would call an extended amount of time.
BY MR. HARRIS:
Q. Now, the area where Mr. Gordon lived and where Timothy Hall lived for this period of time is in



RESP. APP. 16

downtown Newport News?
A. Yes.
Q. And in that general area of Newport News, you indicated earlier that was an area known for prostitution?
A. Correct.
Q. Is that the same area where Timothy Hall lived with the Gordons?
A. Yes.
Q. So he lived in an area that was known by someone as an area for prostitution?
A. Yes.
Q. As far as the -- and the only reason he lived there is because he lived with the Gordons, as far as you knew?
A. As far as I knew. He was not living with his mother at the time.
Q. Did you talk to any other witnesses about -- well, let me back up a minute.

You indicated you spoke to a woman in your church about whether Timothy Hall was a homosexual?
A. Uh-huh.
Q. Can you answer that question out loud?
A. Yes, I spoke to her, and I would have asked her if she knew if he was a homosexual or not.





Q. Did she bring this to your attention, or did you seek her out?
A. I sought her out.
Q. And in the context of the question you were asked a little while ago about whether the women told you that he was a homosexual, was that information they volunteered, or was their uncertainty a response to a question you asked them?
A. I would have asked them if they knew if he was a homosexual. They wouldn't -- I mean, I asked all the questions when I spoke to the lady. The way that came about is somebody at my location said, "Oh, I remember when I used to go down there I knew Timmy from when he was younger." And she, I believe, gave me a name -- whoever it was I spoke to, and I don't remember who it was. She was fairly elderly at that time.
Q. Once you learned there was someone in your church who knew Timothy Hall, you went to that person and asked them information about Timothy Hall?
A. Right.
Q. Other than Mr. Gordon, the lady at your church and the people at the Corner Grocery store, is there anyone else you spoke to in investigating whether or not Timothy Hall was a homosexual or a male prostitute?

A. Not that I know of.
Q. Did you speak to any --
THE COURT: Excuse me, Mr. Harris.
Why were you asking people whether he was a male prostitute or a homosexual? Why were you asking those questions?
THE WITNESS: Hopefully to find some evidence about the victim that we could use as admissible evidence at trial.
THE COURT: To do what?
THE WITNESS: In a sense put the victim's, what little we could, character at issue.
MR. HARRIS: Your Honor, if your question is if the why question was more temporal, then these investigations you did was after you saw this information in the newspaper?
A. Yes. And I --
BY MR. HARRIS:
Q. Is that what prompted you to investigate this?
A. Yes. I would say yes.
Q. Now, you're an attorney. You have been practicing law for almost 20 years?
A. Yes.
Q. Are you familiar with the rape shield statute in Virginia?





**PUBLISHER'S NOTE:**

**Page 20 is not available at this time and as soon as it becomes available it will be sent to you at that time.**

(5)

Supreme Court, U.S.
FILED
JUL 19 2001
CLERK

No. 00-9285

IN THE

# Supreme Court of the United States

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WALTER MICKENS, JR.,
*Petitioner*,

v.

JOHN B. TAYLOR, WARDEN,
*Respondent*.

---

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## JOINT APPENDIX

---

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---

**PETITION FOR CERTIORARI FILED APRIL 6, 2001**
**CERTIORARI GRANTED APRIL 16, 2001**

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REQUEST FOR APPOINTMENT OF A LAWYER

Walter Mickens, Jr. — Juvenile and Domestic Relations District Court

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TO THE ADULT: You have been charged with an offense punishable by death or confinement in the penitentiary or in jail or are involved in a case in which you may be subjected to termination of your residual parental rights and responsibilities. You have the right to be represented by a lawyer with respect to this charge. You may retain a lawyer at your own expense or, if it is determined by the court that you are unable to afford a lawyer, this court will appoint a lawyer to represent you. If the judge appoints a lawyer for you, you shall be required to pay the statutory fee of that lawyer if you are convicted. You may also waive your right to a lawyer.

REQUEST FOR APPOINTMENT OF A LAWYER—
STATEMENT OF INDIGENCY

I, the undersigned, have been advised this day by this Court of my right to be represented by a lawyer in the trial of the case involving me; I certify that I am without means to employ a lawyer and I hereby request the Court to appoint a lawyer for me. My financial statement accompanies this request.

I have been informed that the lawyer appointed for me will be paid with public funds, but if I am convicted of a criminal offense, I shall have to pay the amount of the court-appointed lawyer's fee as part of the costs of prosecution. This lawyer will represent me in this case in all state courts until relieved or replaced by another lawyer.

4-6-92
Date

/s/Walter Mickens, Jr.
WALTER MICKENS, JR.
Adult

The Court was advised that _____, a lawyer has been retained to represent the accused in this Court. This information was provided by:
☐ the above-named person ☐ the lawyer ☐

Date _____

ORDER OF APPOINTMENT OF COUNSEL

The Request for Appointment of a Lawyer was executed under oath. Having examined the Adult and considered other competent evidence. I find that

the Adult is not indigent and not entitled to ☐ representation by a court-appointed attorney;

the Adult is indigent within the guideline ☐ formula set forth in the law and is entitled to representation by court-appointed counsel;

the Adult is not indigent and the Adult refuses ☐ to either employ counsel or waive his right to representation by a lawyer, but that the following circumstances and the ends of justice require the appointment of counsel:

Therefore, I appoint the lawyer indicated below to represent the Adult at such hearings and all other stages of the proceeding in this court and in any other court to which this case may be appealed of certified until relieved or replaced by another lawyer.

5-1-92 9:00 am
Next hearing date and time
Date: 4-6-92

B. Saunders

/s/ Aundria Foster
AUNDRIA FOSTER
Judge



INDICTMENT NO. 23769-92

VIRGINIA:

In the Circuit Court for the City of Newport News at its criminal term commencing August 10, 1992,

The Grand Jury charges that:

On or about March 28 through March 30, 1992, in the City of Newport News, WALTER MICKENS, JR., feloniously attempted to cause Timothy Jason Hall, to engage in forcible sodomy, against his will, by use of force, threats or intimidation,

Virginia Code: 18.2-67.5 (Attempt Forcible Sodomy)

A true bill

Not a true bill

/s/ Illegible
Foreman

Witnesses:

Sgt. D. A. Seals

INDICTMENT NO. 23770-92

VIRGINIA:

In the Circuit Court for the City of Newport News at its criminal term commencing August 10, 1992,

The Grand Jury charges that:

On or about March 28 through March 30, 1992, in the City of Newport News, WALTER MICKENS, JR., feloniously, willfully, deliberately, and with premeditation, did kill and murder Timothy Jason Hall, during the commission of, or subsequent to Attempted Forcible Sodomy,

Virginia Code: 18.2-31(5) (Capital Murder)

A true bill

Not a true bill

/s/ Illegible
Foreman

Witnesses:

Sgt. D. A. Seals



## OPENING STATEMENT

[479] MR. SAUNDERS: Thank you, Your Honor. Good morning, ladies and gentlemen. As you may recall, my name is Bryan Saunders, Mr. Keeling, and, of course, the Defendant, Walter [480] Mickens.

The Commonwealth, in his opening statements, outline to you what they expect they will be able to prove, and the Commonwealth has told you they don't have any eye witnesses, they don't have a murder weapon. They are going to build this case around Mr. Mickens on circumstantial evidence, and you're going to have to look and see if they complete that circle of circumstantial evidence to inculpate the Defendant.

Now, the Commonwealth told you in opening statement that they'd be able to show that Mr. Mickens had the opportunity to commit this crime. They have two witnesses, they say, that sometime between eight and nine supposedly saw Mr. Mickens. The only problem with that is that the actual time frame was before eight that they were supposed to have seen somebody in a park that looked like Walter.

Now, that park is at the end of 28th Street. The evidence will also show, and the only reasonable inference from the Commonwealth's evidence that you will be able to draw, is that the deceased changed clothes after 11 p.m. on the 28th. They will not be able to show you by any circumstances, by any evidence at all, that Mr. Mickens or Walter was there at any time after these people were supposed to have seen him in the park.

Now, they say he has got the opportunity, but what you have got, you will see from the evidence, is that the [481] opportunity isn't there, or they can't establish any opportunity of any way these people could have gotten together. The Commonwealth told you the body of the deceased was found at a given location, which is true. It's the end of 29th Street

underneath a parking platform built out over the river. Now, they will-show you pictures of that area. I suspect if you pay close attention to it, you will find the only reasonable way to get down to that area is at the end of 30th Street where there are some stairs to go down to the riverbank.

How did Mr. Mickens get with Mr. Hall? That is going to be one of the major questions you're going to have to answer, and I do not believe the Commonwealth's evidence will be able to show you that.

They have, as the Commonwealth has advised you, experts that will come in and testify to given factors. They will have a hair expert to come in and testify to some pubic hairs that he compared. That expert will tell you the comparison of hair samples is not positive identification, and one of the reasons it is not positive identification is because people, different people, can have hairs that are so similar that you can't tell the difference.

They will have experts to come in to testify in connection with DNA. Now, you may have read about DNA, you may have heard about DNA. DNA is not the miracle that everybody[482] thought it was when it first came out. First off, there's only going to be a limited number of locations on the DNA chain that they compared. Secondly, it does not say anybody is positively the one that may have given this, left this evidence, at that scene. It says it may be a part of a group.

They will talk about semen fluid. They will talk about cigarette butts, but you will see from the photographs when they are getting ready to introduce them, and you will hear evidence that this area was used by a lot of people. They won't be able to tell you when those cigarette butts got there or how they got there.

You'll hear evidence from experts that DNA can stay stable for a great period. All this is nothing more than



circumstances, and you're going to have to decide whether the Commonwealth's case is such that it ties so tightly that there's no reasonable doubt in your mind from those circumstances that Walter committed this horrible crime.

They will show you pictures, I suspect, of Mr. Hall's body, but remember those pictures don't establish who killed him. So, you have to look at these things. You have to be aware and pay attention to those types of things. They have an individual who is going to say to you a pair of Nike Air Trainers were being worn by the deceased. You have to gage from his appearance on the stand and what he has to say as to how he could identify these shoes as compared to any other [483] given pair of Air Nikes.

You're going to have an individual, as the Commonwealth told you, who's going to come in here and say that Walter sold him those shoes. Well, the Commonwealth told you the man is a convicted felon, recovering drug user, he also drank. His condition today, and what you will see on the stand, is not what he was in March of last year. You have to remember that because you have to gage from what he is going to testify to as to his ability really to remember, really to tell you who sold him those shoes.

Remember, ladies and gentlemen, the Commonwealth bears the burden of proof beyond a reasonable doubt, and you're going to have to decide whether what you hear from that stand they have proven. I do not believe that they will have proven this case. Thank you.

* * * *

DIRECT EXAMINATION—CHRISTOPHER BASFORD

BY MR. GWYNN

[491] Q. You say you normally took your walk in the last half of your hour of your lunch period; is that correct?

A. Yes.

Q. You walk down from 25th to 30th Street?

A. I walk everywhere.

Q. When you normally walk on the beach, did you walk all the way down to 30th Street?

A. It depends on the tide.

Q. You walked that far?

A. Yes.

Q. You're familiar with the area then of that?

A. Yes.

Q. Between 25th Street and 30th Street, are there any stairs leading up to the upper bank of the river?

A. No.

Q. There are some at 30th Street?

A. At the far end I believe there is.

Q. Of 30th Street?

A. Uh-huh.

* * * *

[494] Q. Would you mark that where you were walking?

A. Right there.

Q. Put a "Y" there, please, and that was from the waters' edge that you got up there; right?

A. Yes.

Q. But there's a big bluff, is there not, a bank on the river?

A. Right a long here, both sides, from both sides.

Q. How high would you estimate that would be?

A. Thirty feet.

Q. You walked from the river to get up on that, but there's bluffs on both sides?

A. Yes.

* * * *

DIRECT EXAMINATION—OFFICER D.L. WILLIAMS

BY MR. GWYNN

[496] A. I was standing at the information desk at the Police Department speaking with a detective, and Mr. Basford came and advised us he had found a body lying on



the rocks, and he escorted us to the location where he observed the body which was in the no hundred block of 29th Street. I believe it was the old Basic Construction Company that used to be there. It was the concrete overhang. The body was found under the overhang.

Q. Did you actually go to the location yourself?

A. Yes, I had.

Q. How did get where the body was found?

A. I had to jump over the fence. It's near the shore line. I walked through the sand and over the concrete overhang is where the body was found.

* * * *

CROSS EXAMINATION

BY MR. SAUNDERS

[498] Q. The location where you went down, was there a trail where you went down?

A. I don't recall a trail being there. I don't recall the trail being there.

Q. How did you actually get down there?

A. Jumped over this fence here and came down through here where there was an embankment here, crossed that, and came up to the crime scene here.

Q. Were there any steps over there?

A. I don't recall any steps being here.

* * * *

Q. Officer Williams, you jumped over this fence went to [499] wherever you went, and that was in the daytime; right?

A. Yes, sir.

Q. Wasn't 11:00 o'clock at night or midnight; was it?

A. No, sir.

Q. Basically, other than doing that, all you did was secure the scene until you were relieved by—

A. One of the officers on day shift.

Q. Yes, sir. There were no trails or steps where you jumped over the fence; is that correct?

A. I don't recall any trails or steps.

* * * *

DIRECT EXAMINATION—DR. LEAH BUSH

BY MR. GWYNN

[508] Q. All right. In the case before the Court today, did you have occasion to perform an autopsy on Timothy Jason Hall?

A. Yes, I did, sir.

Q. When and where did you perform this autopsy?

A. I performed this autopsy at the office of the Chief Medical Examiner located in Norfolk, Virginia, and it was performed on March 31, 1992, at 9:00 a.m. in the morning.

Q. And who was present during the course of the autopsy?

A. Mr. Ward and Mr. Murray, two autopsy technicians, as well as Detective Coleman, Newport News Police Department.

Q. Were photographs taken during the course of the autopsy?

A. Yes, photographs were taken.

Q. How was the body clothed when it was delivered to you?

A. The body was clothed only from the waist up. The body was clothed in a gray cloth jacket and a gray T-shirt and red and white socks. No clothing was covering the genitals or the buttocks.

Q. All right. What was the approximate height, weight and approximate age of Timothy?

A. His age, I was told, was 17, and his physical characteristics appeared consistent with the stated age. His height was 70 inches, which is 5 feet 10 inches, and he weighed 155 pounds.



[509] Q. Please explain to the jurors what you found on your autopsy of Timmy?

A. I found Mr. Hall had sustained numerous sharp force injuries. Sharp force injuries are injuries produced by an instrument with a sharp edge which may be a knife, a scalpel, scissors, anything with a sharp edge. In this case, the injuries were consistent with knife wounds and the sharp force injuries occurred in two different types. First, there were multiple stab wounds.

Stab wounds are injuries that penetrate the body deep into the body in a length longer into the body than on the surface of the skin, so they are penetrating or deep injuries. There are also incised wounds which are another type of sharp injury which are, in laymen's terms, cuts on the—where the injury on the skin surface is longer and the injury does not penetrate very deep into the body.

There were multiple injuries, a total of 143 separate sharp force injuries to the body. I noted 62 of these injuries to be paired in many cases in which two of the stab wounds would be parallel next to each other separated by approximately three-sixteenths of an inch. There were 62 paired injuries. If you multiply that by two, as you would in a pair, that would be 124 of those type of injuries. There were 13 separated single stab wounds and 3 paired incised wounds or cuts.

Q. All right, and do you have an opinion with any [510] reasonable degree of medical certainty as to the cause of death of Timmy?

A. Yes, sir. He bled to death, exsanguinated or hemorrhaged to death from the multiple injuries he received.

Q. Did you notice any other injuries, Doctor Bush, aside from the injuries you just described to us?

A. Yes, sir, I did.

Q. And what were they and where were they?

A. He had faint blue contusions present on the anterior surface of the neck approximately here, one on either side of the neck.

Q. Now, did you find during the course—tell the jurors what defense wounds are, if you would, please.

A. Defense wounds are wounds to areas of the body in a person who sees the injury coming and raises a portion of the body in a protective manner. Defense wounds occur on a forearm as in this type of motion. Oftentimes, the backs of the arms or hands or in a case of a sexual or a rape-type of assault also present on the legs if the victim were to raise up their knees to ward off a blow or attack.

Q. During—in this particular case, during the autopsy, did you find the presence of any defense wounds?

A. There were no wounds at all to either the dorsal or volar aspect of the forearms or hands or nothing on the legs to suggest the defensive posture.

[511] Q. Within these 143 separate injuries, stab wounds, did you make any determination as to what number would have been fatal?

A. Yes, sir. It appears that 25 of the injuries would have been fatal-type injuries. By fatal, I mean injuries that perforated or damaged vital structures such as internal organs, lungs, liver, large blood vessels, that type of thing.

There were 25 of these lethal injuries, including 4 pair, for a total of 8, to the right lung, one pair being 2 to the liver, 3 single stab wounds to the left lung, 7 stab wounds to the skull penetrating the underlying brain on the left side of the head, and a stab wound to the forehead that also penetrated the brain and a pair of stabwounds to the right posterolateral neck transecting the right internal carotid artery and the right external jugular vein.

Q. And the deepest stab wound that Timmy sustained, how deep would that have been and where was it?

A. The deepest stab wound was three and a half inches deep into the posterior head and neck area of Mr. Hall.

Q. Would any one or any of the 25 fatal wounds you saw in combination have instantly caused Timmy's death?

A. No, sir. There were no immediately lethal injuries.



Q. And how long—did you have an opinion as to how long he would have lived after the last stab wound was entered to his body?

[512] A. He certainly could have lived for some period of time, several minutes, maybe as long as 30 to 40 minutes.

Q. All right. Do you have an opinion as to whether he would have been conscious during this time?

A. With injuries to the brain such as he sustained, he may have been conscious, though it is also equally possible that he was unconscious, so I wouldn't be able to say for sure.

Q. Okay. Were you able to draw any conclusion as to the time of his death based on what was presented to you?

A. No, sir, I was not.

* * * *

[515] Q. Doctor Bush, do you have an opinion as to what could have caused the paired stab wounds that you saw?

A. Yes, sir. I gave that great thought, and an instrument that would produce paired stab wounds in which the pairs remain the same distance apart throughout the entire assault would be something such as a Swiss army knife or a knife such as a Swiss army knife with multiple blades that can be removed from the sheath of the knife. In this case it appears to me multiple blades are in the knife, two of the blades pulled out simultaneously, to produce something resembling a barbecue fork but being paired as two knife blades.

* * * *

[516] Q. Doctor Bush, during the course of the autopsy or in connection with the autopsy, is any effort made to try to find out if a victim in a case has blood alcohol level?

A. Blood and urine specimens are taken to the toxicology laboratory for testing for the presence of drugs and alcohol.

Q. And what were—was there any evidence of the presence of any drugs or alcohol in Timmy's system?

A. No, sir. The blood was negative for alcohol and the drug cocaine, a breakdown product of cocaine called benzoylmethylecgonine, and morphine.

Q. So, there was not the presence of any of those things in the body?

A. No, sir. There were no drugs detected.

* * * *

CROSS EXAMINATION

BY MR. SAUNDERS

[517] Q. You found no injuries to the genitalia?

A. That's correct. I examined the genitalia, and there were no injuries to the anal ring or penis and scrotum.

Q. In connection with the wounds, most of them were on a left to right diagonal; is that correct?

A. Many were straight in as well, sir, as well as some on an angle.

Q. You have a copy of your report?

A. Yes, sir, I do.

Q. And I believe on Page 3 and C-1, you said the majority of the wounds were from left to right?

A. Yes, sir, though some were straight in as well.

Q. So, the majority were from the left to the right, and[518] wouldn't that indicate he was stabbed from a left-handed direction considering the way the body was found? You were told how the body was found?

A. Yes, sir. The body was face down when it was found. That could be produced by a left-handed person stabbing in a left-handed direction, whether left-handed or not, with a left hand if the person was also in the same line with the head, facing the head of the victim, though a right hand could do it if a person was standing above the victim on the other side.

Q. Standing at the head part?

A. Yes, sir, that's correct.

* * * *



DIRECT EXAMINATION—SANDRA CLEARY

BY MR. GWYNN

[525] Q. Turning your attention to March 30th of 1992, did you have occasion to participate in the processing of the crime scene involving the death of Timothy Jason Hall?

A. Yes, I did.

Q. Tell us when you became involved in this investigation and what you did?

A. Okay. On March 30, 1992, at approximately 1:15 p.m., I responded to the no hundred block of 29th Street which runs up to the James River. The crime scene was located under a parking lot which was the site of the old Basic Construction building. This parking lot sits up on pilings and underneath the pilings was a bulkhead. Dirt from the bulkhead had been pushed up underneath the pilings and just mounted up, and on top of this mound there was a yellow flowered mattress, and on the mattress there was the deceased.

He was a white male, approximately 20 years of age. His body was concealed by a very large piece of plywood, approximately five feet in length. The plywood board was painted. Some parts of it were painted red, but it was very weathered.

Q. And who was at the crime scene when you got there?

A. When I got to the crime scene, there was a Detective Coleman, and I'll need to refer to my notes.

Q. Sure.

A. Detective Coleman, Detective Kasey, Detective Riley, [526] Sergeant Morgan, Sergeant Hallet, Fire Department personnel, and also Senior Technician Dan Sexton.

* * * *

A. I asked for Detective Coleman to assist me in [527] removing this board, and as I removed the board I saw that the victim was nude from the waist down. He was face down on this mattress, and was wearing nothing from the waist

down with the exception of his socks which were athletic socks.

From the waist up he had on a gray sweatshirt, and underneath the sweatshirt was a Miami Hurricanes T-shirt. The only other article that he was wearing was a gold chain with a Mercedes Benz medallion on that chain. I made several observations which on the victim's buttocks I noticed there were several loose hairs, and I wanted to collect those first thing. We had some wind that was blowing in off the river, and I was afraid we'd lose that evidence. So, I quickly removed that and collected the hairs before going to any other collection stage of the crime scene.

Q. How did you actually collect the hairs from Timmy's buttocks? What did you do?

A. Our lab in the State recommends that we now use post-it notes. There's adhesive on the post-it notes which will not damage the hair in any way. I had post-it notes, two of them. I saw a visible hair. I patted down a post-it note on the hair, picked it up, placed it in a plastic bag, sealed it up, initialed it and put the date on this. I did the same thing with another hair that was very obvious to me, patted it down, picked it up, placed it in a plastic bag, sealed it up and placed my initials on it.

[528] Q. Where was that hair?

A. Both of the hairs that were very visible to me were on the victim's buttocks. I also made other observations after I collected those hairs and those observations were also noted on the victim's buttocks and on the victim's outside thighs, and those items would be—there was a cloudy, almost whitish substance that was on the victim's buttocks but near his anus. There was also bloody transfer stains on the victim's outside thighs.

Q. What is a transfer stain?

A. Well, it's usually caused where something touches blood, and that object that touches the blood rubs against another area transferring a stain there.



Q. Where were those transfer stains that you recovered that you observed?

A. The transfer stains were on each leg of the victim's outside thighs.

Q. And the substance that you observed, did you take a sample of that white milky substance?

A. Yes, I did.

Q. That substance had the consistency of what?

A. It was very much like a very thin diluted sample of suntan lotion.

Q. Okay. What else did you do?

A. Well, I moved—after the body—after I removed [529] these pieces of evidence, the hairs, I moved around to the mattress itself to look for other pieces of evidence that I thought might be critical.

I noticed there was cigarette butts around the mattress, and the first cigarette butt I came across was on the left side of the mattress. I could not read the name brand on the cigarette butt. However, it did have the letter "D" on it, and I collected that cigarette butt, placed it in a plastic bag, sealed it up, initialed it with my name and the date and time it was collected. I then searched for additional cigarette butts and found another one on the right side of the mattress on the ground, and this one had the name Doral on it.

I then placed that in a plastic bag and sealed it up, initialed it and placed the time and date on it. One additional cigarette butt was also recovered, not as close to the mattress. It was 15 feet away from the very end of the mattress, between the mattress and the bulkhead, and it had the same filter design as the other cigarette butts. However, no name was seen. That was also packaged, sealed, I initialed it, dated it and put the time on it.

* * * *

[535] Q. Ms. Cleary, let me show you what has been marked Commonwealth's Exhibit 4-A, again, and could you

tell me did you make any observations as to how far the victims legs were apart?

A. Well, I took some measurements and my measurements indicated that his feet were approximately 12 inches apart.

* * * *

DIRECT EXAMINATION—ROBERT COLEMAN

BY MR. GWYNN

[555] Q. Did you assist Mr. Sexton of Crime Scene Search in the recovery of evidence?

A. I was present, and I observed washed up in the surf what appeared to be a pair of men's blue jeans and a pair of white briefs located in the surf. I pointed those out for Mr. Sexton and requested they be recovered.

* * * *

[556] Q. Okay. Now, what next did you do in reference to this investigation?

A. The next portion of the investigation I was involved in, I was notified—while after walking away from the crime scene, I was notified by a uniform officer that he had two black males with him and that they had a roommate that had been missing for several days. I found these black males to be Mr. Raheem Gordon and Mr. Tallran.

In inquiring about the roommate, they stated they had a 17-year old white male that lived with them by the name of Timothy Hall that they had not seen since the evening of the 28th. I questioned Mr. Raheem Gordon and asked about Timothy's physical description, what he was last seen wearing when he last saw him on the evening of the 28th.

He stated when he last saw him he had a pair of blue jeans on, a pair of Nike low top tennis shoes with purple—[557] find exactly the shoes—I believe it was purple, green and turquoise and gray coloring on these white tennis shoes. When he last saw him he had a Duke University T-shirt on



and Duke University hat, but those were found the next day when he went to return home.

Q. Based on your conversation with Mr. Gordon, what did you do?

A. He went on to say he had a silver neck chain with a Mercedes Benz-type emblem on the neck chain; that was located on the deceased male found. With that I—that was at the scene. I took him to Police Headquarters where I presented him with photographs of the victim, and he identified him as the male he knew as Timothy Hall.

* * * *

DIRECT EXAMINATION—RAHEEM GORDON

BY MR. GWYNN

[562] Q. All right. Do you still live with your dad?

A. My father passed three months ago.

Q. As of March, 1992, how long had Tim lived with you and your dad?

A. About two or three months.

Q. Okay, and do you know where Tim was living before he began to live with you?

A. Before he began to live with me?

Q. Yes, sir.

A. All right. I think he was staying with his mother, I'm not sure.

Q. How did Tim come to live with you, you and your dad?

A. When I stayed in Newport Towers we became friends. I'd been knowing him about two years, so he came over one time when I stayed at Highland Apartments. He had problem with social workers. I told him I'd talk with my father about moving in with us. He said all right. So, we talked to the social worker.

Q. How many bedrooms did your apartment in Highland Apartments have?

A. Two.

Q. And did you and Tim share a bedroom?

[563] A. Yes.

Q. Did Tim have a lot of clothes?

A. Somewhat.

Q. What items of clothing did he have, if you remember, when he moved in with you and your father?

A. A lot of like T-shirts with teams on them, jeans, like basic clothing.

Q. What about shoes?

A. Shoes. Yes, he had like two or three pair of sneakers.

Q. Okay, and did you and he exchange clothes; you wear his, he wear yours?

A. Yes.

* * * *

[564] Q. Now, the last time you saw Tim when he dropped you off at the party, how was he dressed?

A. He had on some blue jeans. I think he had on like a Duke shirt or Miami Hurricanes. It was either or, I'm not sure. He had on Nike sneakers.

[565] Q. What kind of sneakers was he wearing?

A. Nikes.

Q. Describe them for me.

A. It was Cross Trainer, it was like a purple, greenish, funny-type green like an off green, it was white and gray.

Q. Okay.

Q. Do you know where he got those from?

A. Me.

Q. They were yours?

A. Yes.

Q. How long had you owned them?

A. About two months, but I hardly ever wore them.

* * * *

[570] Q. Let me to show you Commonwealth's Exhibit Number 13 and ask you if you recognize—let me know if you recognize these, please?

A. Uh-huh.



Q. What are they?

A. My sneakers.

Q. How do you know—look at them very closely, and tell the jurors, how do you know these were your sneakers?

A. I can remember the scuffs on it because I scuffed it on the side.

Q. Which shoe are you talking about?

A. The right shoe. I started right here on the top. I scored like on the—inside of the inside left shoe on the tip and in front right here. I mean I could tell my shoes. You know your sneakers. If somebody brought a new pair of sneakers, took yours off, you'd know they were yours.

* * * *

## DIRECT EXAMINATION—VINCENT WEST

BY MR. GWYNN

[591] Q. Tell the jurors if you would, please, what happened when you went to the park?

A. Me and Bruce went over and sat on this bench close to the water, and on the way down there we seen this dude walking, coming towards us, coming down the sidewalk like going towards the store, and we went and sat on the bench, and he was over in the bushes, you know, kind of hiding out or something, I don't know. Then we sat around and smoked our cigarette, got ready to go back in the house, and we walked past him, and he was playing around with his bike doing something.

I said something to him. He didn't say nothing. He just looked at us. I said, "Well, come on, let's go in the house." We went in the house.

Q. How long did you sit out in the park, Vince?

A. About 15 minutes, about 15 minutes.

Q. And the person you saw fiddling around with the bike, where was he during that 15 minutes or so?

A. In the bushes.

Q. And where were the bushes located?

A. Right on the outside of the building, right—it's a swimming pool, and then there's a bunch of bushes right next to that. He was where the bushes were.

Q. How close did you get to this person at the closest point you got to him? How close were you to him?

A. I could have touched him, I mean right like this.

[592] Q. Okay, and when would that have taken place where you were that close to him?

A. When we left and were on the way to the house.

Q. How was he dressed?

A. He had on a camouflage-like army jacket-type thing and some raggy, you know, looking clothes on, and his hair was kind of messed up, and he had that bike.

Q. Describe the bike for me.

A. It was a 10-speed with a little ball rack on the back of it or something, and I remembered it because it had the gold tape on the rims, the handlebars were up like this, not the normal way.

Q. And how close did you get to the bike?

A. Touching distance, I could touch the bike.

Q. What were the lighting conditions out there during the course of this time?

A. There was one light that was out, but there was like three or four more that were on. It was pretty bright out.

* * * *

[594] Q. I want you to look around the courtroom and let me know if you see the individual you saw out there in the park that night?

A. Right there.

Q. Where is he?

MR. GWYNN: Let the record reflect he identified the Defendant.

* * * *



## DIRECT EXAMINATION—MICHAEL JACOBS

BY MR. GWYNN

[617] Q. And did you talk to any detectives over there?

A. Detective Seals.

Q. Anybody else?

A. No.

Q. And do you know why you were brought over?

A. They said, "You got a dead man's tennis shoes."

Q. What kind of tennis shoes were you wearing?

A. Michael Jordans.

Q. Can you describe them for me? What did they look like?

A. Purple and kind of red and like white.

* * * *

[618] Q. How long had you been wearing those tennis shoes as of April 7th, Mike?

A. About five days.

Q. Now, can you tell these people, the ladies and [619] gentlemen of the jury, how you got those tennis shoes right there?

A. I bought them from Walter Mickens for $5.00.

Q. You bought them from Walter Mickens for $5.00?

A. Yes .

* * * *

[620] Q. Okay. Tell me what happened. What did Mr. Mickens say to you, and what did you say to him?

A. Said, "Tennis shoes for sale." I looked at it. I said I like those, they look good. He said he wanted $5.00 for them. I gave him $5.00, and I left.

Q. Okay. What did you do with the tennis shoes you got from him?

A. I went over—they were kind of damp. I went in and dried them, you know, then I went and put them on.

Q. You say they were damp?

A. Damp a little bit.

* * * *

VOIR DIRE EXAMINATION—TYRONE BRISTER

BY MR. GWYNN

[688] Q. When you were in the holding cell did you have the occasion to see the Defendant, Mr. Mickens?

A. Yes, sir.

Q. Had you ever seen him before?

A. No.

Q. Who else was in the holding cell with you?

A. At the time it was like about five or six other guys in there.

Q. Where did they go? Do you have any idea?

A. I think they went to court and back, same.

Q. Now, did you have any—did you talk to Mr. Mickens at all?

A. Yes, I did.

Q. What did you say to him and what did he say to you?

A. For a brief moment in time, he was like quiet, and everything was quiet. Then conversation started. We were joking. Then all of a sudden I said, "What are you here for?" He said—well, I said, "What are you here for? You sound like a nice guy, why are you in jai?" He said, "Well, they say I supposed to have murdered two or three guys." I think he [689] said three—he said two.

Then he said, "They say I murdered two guys, I supposed to stabbed him in the head, back and shoulder," then under his breath he mumbled, "Which I did," like that. Then he said, "They said I sold his shoes, supposedly sold his shoes, sodomized him at the time." I didn't understand what sodomizing meant at the time.

I didn't know what it was, and he said—every time he said, "They said I did it," then he said, "Which I did." Then he asked to change the subject, so I then put my head down, then they came and got me out of there.

Q. How long did your conversations with him last?



A. Five or ten minutes, no more than that.

Q. How did it end? What did he say to you and what did you say to him when the conversation ended?

A. "Change the subject."

Q. Who said, "Change the subject"?

A. Mr. Mickens.

Q. He said, "Change the subject"?

A. Yes.

* * * *

[700] THE COURT: Do you understand that this case involves one person's murder, you understand that, and Mr. Mickens is being tried for the murder of one person in this case, and do you understand that if you told the jury that he said to you, "They say I killed two people, which I did," that could hurt him in this case because he would be in effect saying he killed two people when the only thing the jury has to consider in this case is whether he killed this person; you understand that?

THE WITNESS: I understand.

* * * *

DIRECT EXAMINATION—TYRONE BRISTER

BY MR. GWYNN

[708] Q. All right, and how long were you in the holding cell with Mr. Mickens by yourself with you and him?

A. About 15 minutes.

Q. Okay. Again, is Mr. Mickens here today?

A. Right there.

Q. Point him out for me, please.

A. Right there.

Q. Which one of these gentlemen is it?

A. The one on the end over there.

Q. This one?

A. Yes.

MR. GWYNN: Let the record reflect he identified the Defendant.

THE COURT: So reflect.

MR. GWYNN:

Q. After everybody left, did you and the Defendant talk?

A. Yes.

Q. What did you say to him?

A. I asked him, "What you here for, you seem like a pretty nice guy, you shouldn't be here," and everything and what did he do.

Q. What did he say to you?

A. He said, "They said I stabbed somebody 140 something times in the head, right here in the head," like that. Then he said, "Which I did."

[709] Q. Speak up.

A. That's how he said it, "Which I did," like that.

Q. He lowered his voice and said, "Which I did"?

A. Yep.

Q. What else did you say to him and he to you?

A. Then I asked him—he asked me me—I asked him, then I said—Mr. Mickens said, after he said that, he repeatedly said, "They said I supposed to sodomize him and stole some sneakers, black and white Nikes, and try to sell them, which I did," like that.

Q. He said, "Which I did," after that, also?

A. Yes.

Q. What else did you say and what else did he say?

A. I said, "Why did you do it?" He looked at me kind of suspicious like I was an undercover cop, something like that, and said, "What you looking at me for?" He said, "Change the subject," I said, "No problem, I'll change the subject." He said, "What are you here for, what are you here for?" I'm thinking, "What can I think of, he killed somebody?" I said, "I beat six cops up."

Q. Was that true?



A. No.

Q. Did you see Mr. Mickens anymore after that?

A. No.

* * * *

## CROSS EXAMINATION

### BY MR. SAUNDERS

[716] Q. The only time you saw Mr. Mickens was in that holding cell?

A. That's it.

* * * *

## DIRECT EXAMINATION—DET. DALLAS MITCHELL

### BY MR. GWYNN

[727] A. Basic Construction Company is at the dead end of 29th Street which is the part that backs up to the James River at the dead end of 29th Street.

Q. All right, sir. Go ahead.

A. As we pulled into the block, I saw Mr. Mickens riding a bicycle coming out of the parking area of the Basic Construction Company heading, it would be east, on 29th Street.

A. What did you do then?

A. We then stepped from the vehicle, Sergeant Seals identified himself, and Mr. Mickens fled the area on a mountain-type bicycle.

Q. What did you do next?

A. He was then apprehended—I chased after him for a period of time. I lost sight of him. As he rounded 32nd Street onto Washington Avenue, a short time later, I was made aware that he was in custody at 33rd and Huntington Avenue. I then went to that location.

* * * *

[729] A. You have a right to remain silent, anything you say can and be will be used against you in a court of law.

You have a right to have an attorney during questioning. If you can not afford one, one will be appointed before questioning if you wish one.

Q. Going back to when you came in contact with him 5 minutes after 12 on April 5th, tell the ladies and gentlemen of the jury what happened then?

A. I explained to him I knew he had committed this murder. I was confronting him in reference to it. He at that point was denying that he had any involvement in it. He told me that he knew we were in an interrogation room, that he'd been in one. He knew if he said anything he knew I could use it in court against him later. After talking with him for some time he made a statement to me, he said, "You didn't find no knife on me; did you?"

Q. Now, had you mentioned to him that Timmy had been stabbed?

A. No, I hadn't. At that point we had not mentioned anything about how Timothy Hall had been killed.

Q. All right, sir. What was the statement he made to you?

A. He said, "You didn't find no knife on me."

Q. What is the next thing that happened?

A. I talked with him further in reference to this. I [730] asked him, you know, if this person had done anything to provoke him into killing him. He told me that he didn't kill anybody, but if he had that it would have been without being provoked. I asked him what he meant by that. He said, "Nobody provoked me or there was no provocation for me to kill anyone. I didn't kill anyone."

Q. All right, sir.

A. As the morning progressed, at approximately 3:05 hours, I was still interviewing him, and at this point I explained to him that the other detectives in the squad were obtaining a search warrant for his person to recover trace evidence to include hair, blood, saliva. I explained to him that we had recovered hairs of the suspect from the body, and



semen in the victim's body that can be matched through DNA.

I asked him if he knew what DNA was, and he stated that he did, and at this point he got rather quiet, broke down into a full sweat to the point where he had sweat dripping off his nose and his face. I asked him what the problem was. He said it was getting hot in the room because he had his coat on. He stayed in this state for a couple of minutes.

He then calmed down. After calming down, I tried to talk to him further. At this point he turned his back on me and stated he didn't want to think about this anymore.

Q. Did you leave at that point?

A. We discontinued the interview at that point.

* * * *

## CROSS EXAMINATION

### BY MR. SAUNDERS

[734] Q. Detective Mitchell, basically what you're saying is Mr. Mickens denied any involvement in the murder; aren't you?

A. Yes, sir. He did deny any involvement.

Q. And you're drawing some conclusion, or drawing a point, that you hadn't mentioned any knife when he said you hadn't found a knife on him?

A. I had not mentioned the way he was killed at that point.

Q. Are you familiar with the newspaper articles on this particular murder, especially March 31st of 1992?

* * * *

## VOIR DIRE EXAMINATION—MIRIAM VANITY

### BY MR. KERNS

[804] Q. You can visually eliminate Mr. Hall as the depositor of that sperm on the mattress; can't you?

A. That's correct.

Q. Because his two—

A. His two line up here and here.

[805] Q. And don't line up with the stain?

A. Right.

Q. The data that is in the computer program to give you a percentage, if Mr. Mickens isn't the one who did it, the data tells you what percentage it could be, where does that data come from?

A. That's the F.B.I.'s database that I go into and determine—I determine it for each band, how often is that particular band in that particular position seen in that population; that one, too, and then I go to the previous auto rad which is here; how often is this band seen in a given population, and how often is this band seen in a given population?

Q. All right. So, your conclusion then in this case is that Mr. Hall is eliminated as the depositor of the semen on the mattress?

A. Correct.

Q. Mr. Mickens could be included as a possible depositor of the semen on the mattress?

A. Yes, he cannot be eliminated either.

* * * *

[806] Q. What is the percentage of the population that could have deposited the stain on the mattress?

A. Okay. Out of the Caucasian population, one person out of every 21,000; from the black population it's approximately 1 in 6,000, and from the Hispanic population it's approximately 1 in 2,000. Again, what this really means is if Mr. Mickens was not the one to deposit the genetic material that I found—

* * * *

RE-CROSS EXAMINATION

BY MR. SAUNDERS

[821] Q. What was the result of the other two probes?



A. No interpretable NA profiles were obtained at chromosome Number 2 or DT2 S 44, the genetic locus, and no conclusive results were obtained for genetic locus D, 4, S, 9. The number after the D refers to the chromosome of the locus I'm looking at.

Q. Do you know why you didn't come up with any interpretable results?

A. It was just something that I was not sure enough to make a call on. I couldn't eliminate Mr. Mickens, but I couldn't include him either, and the same thing for the inconclusive result. I could not verify that result with the computer assisted program, or I could not assign a numerical value to the bands pattern I found. Again it does not exclude him.

* * * *

DIRECT EXAMINATION—MYRON SCHOLBERG

BY MR. GWYNN

[836] Q. All right, sir. Now, in reference to Item Number—Commonwealth's Exhibit Number 5 containing Items 1 and 2 which are pubic hairs removed from Timothy Jason Hall's buttocks, what kind of examination did you conduct on Commonwealth's Exhibit Number 5, in relation to the known hairs of Walter Mickens and the known hairs of Timothy Jason Hall?

A. These items were given the laboratory number Item 1 and 2, and they were identified to me as hairs that were removed from Timothy Jason Hall's buttocks. I also should mention that when I mounted the known samples of hair, Timothy Jason Hall hairs were Caucasian, and Walter Mickens, Jr., were [837] hairs of the Negroid race.

In Items 1 and 2, which is State's Exhibit 5, I found four pubic hairs that were of Negroid origin on Item Number 1 which is a portion of State's Exhibit 5, I found the three pubic hairs, and in Item Number 2, one pubic hair. They were all of Negroid origin. I placed them. I mounted them on glass

slides, and I compared them with the hairs identified to me as orginating from Walter Mickens, Jr., and I found that the hairs were alike in all identifiable microscopic characteristics, that is, they lined up on the comparison scope as one hair.

My conclusion, as I indicated earlier, was that they could have originated from this person. They either originated from him or another person of the Negroid race who had occasion to deposit hairs there, and they either originated from him or another person whose hair characteristics were the same.

Q. All right, sir. Now, how could you tell that the hairs, the hairs in Items 1 and 2, pubic hairs from Timothy's buttocks were, in fact, pubic hairs that was unique to those hairs?

A. A pubic hair is easy for someone trained to differentiate with hair from any other body area. A pubic hair has a condition referred to as buckling. This causes a disproportion of the shaft as it goes from the proximal out to the distal end. While it is true in Negroid hairs that there's a variation of the shaft, also, in head hairs from the person [838] of the Negroid race, a head hair is usually not nearly as course and is pigmented so completely as a pubic hair would be.

Q. All right, sir, and could those pubic hairs that were contained in Commonwealth's Exhibit Number 5 have originated from Timothy Jason Hall?

A. Yes, they could have.

Q. The ones that were found on his buttocks, could they've been his hairs?

A. Oh, could they have been his hairs?

Q. Yes, sir.

A. That were found on the victims buttocks?

Q. Yes. I thought you just told us they were Negroid hairs. Let me repeat my question. The hairs that you found contained in Commonwealth's Exhibit Number 5 that you described as Negroid hairs as being microscopically similar to



Walter Mickens, could they have originated from Timothy Jason Hall?

A. No, they could not have.

Q. Is it possible at all?

A. No.

Q. Now, you have also told us that you can tell through your examination if hairs had been forcibly removed. How can you tell that, Mr. Scholberg?

A. If there's a root present, it's possible for me to determine if the hair has been forcibly removed. As a hair approaches the end of its growth stage, it will tend to appear [839] more like a bulb in nature. I'm talking about the root of the hair, and we lose hairs from our head every day. Some of us lose them more rapidly than others, but unfortunately this happens. As the hairs approach the end of their growth rate they will be removed by combing, what have you, and the hair will look like an ordinary light bulb.

If there's force used to recover hairs from a person's head, the hair will be—will not have the appearance of a light bulb. It will be strung out and have an entirely different microscopic appearance. It will usually have tissue attached to it. With particular reference to these hairs, there were three of the four hairs that were removed that had tissue attached to the end, and they were not bulbist microscopically. So, the fact that it did have tissue attached to the end, or what I refer to as folliculation a little piece of tissue would indicate there probably was force used to remove the hairs from the skin surface.

Q. Some force?

A. Yes.

Q. In your opinion, those three hairs you saw with tissue at the end could have been removed by the killer in this case rubbing his genitals against Timmy's buttocks?

A. Well, that's possible. There was some force used, what it was I could not tell.

Q. Is one of the forces you have seen in your experience [840] friction that could have done this?

A. Yes, I would say it could have, yes.

* * * *

CROSS EXAMINATION

BY MR. SAUNDERS

[841] Q. You're not positively saying that these hairs came from Walter. You're saying they came from him or somebody else of the black race who had the same type of characteristics of his hair?

A. That's correct.

Q. You were also asked in addition to the other items to compare hairs found on a mattress cover; is that correct?

A. Yes.

Q. What types of hairs were those?

A. Would that be my Item 8 you're referring to.

Q. Yes, sir, your Item 8.

A. Item 8 was identified to me as a piece of mattress fabric, and on that particular item, there were Caucasian hairs, and there were Negroid hairs that were dissimilar to those identified to me as coming from Walter Mickens.

* * * *

DIRECT EXAMINATION—SERGEANT DAVID SEALS

BY MR. GWYNN

[847] THE WITNESS: On that date, March 30th, sir, I went to the no hundred block of 29th Street to where a business is located that used to be Basic Construction. It's located at the very dead end of 29th Street. In the rear of the Basic Construction building, sir, there's a parking lot. This parking lot has a support overhang that actually starts at ground level at the end of 29th Street and goes out over to the shoreline of the James River, and it's supported by concrete pillars. I went down the embankment there to the area underneath the support parking lot.



BY MR. GWYNN:

[848] Q. How did you get down there, Sergeant Seals?

A. It's a steep incline. I went down—there's a drain pipe that runs down one side of the concrete embankment, and I used the drain pipe about halfway down and then you kind of have to walk on the incline, hold onto whatever you can.

Q. You didn't use any steps or anything like that?

A. No, sir. There's no steps to get down to that location.

* * * *

Q. All right, sir.

A. —is a view from the water facing—looking into [849] the overhang parking lot. This is the actual parking area right here, these are the concrete pillars, and the body was discovered on this incline embankment underneath the overhang.

* * * *

THE WITNESS: The area in which I actually came down was on this side, sir, and you can't see it because it doesn't show the complete incline. I did come down this side of the embankment and around here.

* * * *

A. This would be a photograph looking, this is the dirt embankment where the seawall is, here, it's actually this wall right here. This is the dirt embankment that runs from this seawall up to the bottom of the overhang.

* * * *

[852] A. It was approximately 6:35 p.m. on April 4th. I was in plain clothes. I was with Detective Mitchell. We had pulled into the no hundred block of 29th Street. I was operating an unmarked police unit, 1991 Ford Taurus. When I turned into the no hundred block of 29th Street, I observed an individual that I later found to be the Defendant, Mr. Mickens. At the time that I first saw him, he was at the dead end of no hundred block of 28th Street in the parking area where Basic Construction is.

When I saw him he was on what appeared to be a black mountain black, a bike that was black in color, had the large known tires, straight handlebars. When I observed him, he had started to come up 29th Street toward West Avenue which would be traveling in a direction as if he were going toward Hampton.

Q. When you first saw the Defendant, where was he in relation to the crime scene?

A. He was there. He was at the dead end of 29th Street is where the Basic Construction lot sits, the parking area that's an overhang. You can't really get to it from that area, but he was right at Basic Construction, right at the dead end of the no hundred block of 29th Street.

Q. What did you do next?

A. I pulled the police unit over to the left-hand side of the road, which we consider the south side of the street, I exited the police unit. I had this badge on a holder that is [853] attached to my belt when I am working a plain clothes assignment. I pulled the badge out. I took a position on the sidewalk, on the south side of the street. As he was approaching, he got to within about five to ten yards on the bicycle. I advised him, "Police officer, stop, I need to talk to you."

Q. Now, what did you do with your badge?

A. I held it up in my hand.

Q. All right, sir.

A. So, hopefully that he could see. At the time that I did that, sir, I heard him make a noise that sounded like a grunting noise. He instantly turned the bicycle to the right, he proceeded into a parking area in the no hundred block of 29th Street that is surrounded by chain fence. He made a U-turn circle which would put him going toward 29th Street of the no hundred block. He crossed 29th Street and he was traveling so fast he was trying to maneuver his bicycle between—

MR. SAUNDERS: Judge—



THE COURT: Sustained.

THE WITNESS: I saw him run into the fence. He straightened the bike. He then went between two concrete and brick posts in the no hundred block of 29th Street and proceeded through the apartments toward the no hundred block of 30th Street.

* * * *

[857] Q. During the course of this entire investigation, Sergeant Seals, was there a murder weapon ever removed to your knowledge?

A. No, sir.

[858] Q. All right, sir. Now, turning your attention, if you would please, to your contact with Mr. Mickens on the morning of April 5, 1992, tell the jurors about that, if you would, please.

A. All right, sir. On April 5, 1992, at approximately 9:30 in the morning, I entered the interview room of the Major Crimes Office located on the seventh floor of the Police Department. When I entered the room, I had warrants for the arrest of Mr. Mickens in reference to this case. I had photographs of the injuries that the—photographs from the crime scenes that depicted the injuries to Mr. Hall. I entered the interview room. Mr. Mickens was in the interview room by himself.

I again advised him who I was. I again advised him of his Miranda Rights, and at which time he stated he understood his rights, and he was willing to talk with me. At that time, I sat down, and then I began to read the actual warrants to Mr. Mickens.

When I began to read the warrants to Mr. Mickens, this is the first time during this entire interview process that he'd actually seen the warrants for his arrest, he put his fingers in his ears like this, and he rocked back and forth like this in a chair.

MR. GWYNN: Judge, let the record reflect that Sergeant Seals put his fingers in both of his ears and rocked
[859] back and forth in the witness chair.

BY MR. GWYNN:

Q. All right, sir. How long did that go on?

A. While I was reading the warrants to Mr. Mickens, it went on. At one point it got to be where he was doing it very quickly, fast. I actually, you know, stopped what I was doing to watch what he was doing at that time. Then when I proceeded, after reading the warrants, I tried to hand him the warrants, and basically it was a situation where he was rocking.

So, at that point in time is when I began to show him the photographs of Mr. Hall. I also advised him in the interview room that I knew that he was responsible for this, that he had done it, and I was showing him the photographs. For a short period of time he stopped to look at the photographs, and then I continued, and I asked him how he could have done something like this. He began rocking again, and he made—I attempted to give him the warrants again, and this is when he made the statements, "I accept these warrants, I accept these charges."

Q. What was his tone of voice when he said that to you?

MR. SAUNDERS: Judge, that is a characterization, I think.

THE COURT: Well, he can say whether he talked loudly or softly or stuttered or—

[860] THE WITNESS: The tone was above a normal conversation tone.

BY MR. GWYNN:

Q. All right, sir. He said, "I accept these warrants, I accept these charges"?

A. Yes, sir.

Q. What else happened then?



A. At that time, sir, I didn't understand what that meant. I asked him, I said, "Does that mean are you telling me you did this or are you telling me you're just accepting the fact I'm serving the warrants on you?" At that time he looked at me and said, "Mother fucker, if I told you I accept these warrants, that means I'm guilty; don't it?"

Q. All right, sir. What did you do then?

A. At that time I asked him if he was willing to make a statement in reference to the commission of these crimes. He stated, "No, take me to jail. I want to go to jail. I want to go now, I want to go now."

At that time, as far as I was concerned, sir, he had invoked his right to any interview. I ended the interview. I didn't ask him anymore questions. I wrote down the statements that he had made because I felt that they were extremely important, and he was at that point taken from where we were at to the jail.

Q. All right, sir. Now, do you have the actual notes of [861] these statements?

A. This is—I had a yellow note pad in the room, sir, and this is my writing.

Q. Did you write that down in the Defendant's presence?

A. Yes, sir. He was in the room.

Q. Did he make any comment to you as you were writing it down?

A. He became highly aggitated as I was writing this.

MR. GWYNN: May I approach the witness?

THE COURT: You may.

BY MR. GWYNN:

Q. What do your notes say?

A. I have got the dates 4-5-92, I've got 9:30-9:41 on it, which was the actual start and finish time, I have got my name, I've got, "I accept these warrants, I accept these warrants. Mother fucker, if I told you I accept the warrants

that means I'm guilty; don't it? Take me to jail, I want to go to jail, I want to go now, I want to go now."

Q. How much time went by between the actual time Mr. Mickens said that to you and you actually wrote this down?

A. Several minutes, several minutes.

* * * *

CROSS EXAMINATION

BY MR. SAUNDERS

[864] Q. Next time you saw him was when he was in custody of Officer Trawitski?

A. Yes, sir, 33rd Street and Huntington Avenue.

Q. And from that time—which was approximately what?

[865] A. The initial stop was 18:43, sir.

Q. Okay, sometime around 6:45 p.m., until 9:30 a.m. or 9.41 a.m., he'd been continually in police custody, had he not.

A. Yes, sir, he had.

Q. And he'd been interviewed by Coleman—Mitchell, Coleman, Williams, taken to the hospital, and brought back, all the time brought back over to the Seventh Floor of the Newport News Police Department; is that correct?

A. Yes, sir.

Q. Until such time he made the statements he made to you at approximately 9:41 on April 5th?

A. Yes, sir.

* * * *

[870] MR. KEELING: Your Honor, we call Mrs. Mickens.

THE COURT: All right, Mr. Keeling. All right, ma'am. Would you please come forward and be sworn. You have been here previously; have you not, ma'am?

THE WITNESS: Yes.

*CATHERINE MICKENS*, called as a witness on behalf of the Defendant, after having first been duly sworn, was examined and testified as follows:



DIRECT EXAMINATION

BY MR. KEELING

[870] Q. Could you state your name for the jury, please?

A. Catherine Mickens.

Q. How are you related, if you are, to Walter Mickens, Jr.?

A. He is my son.

Q. Okay, Ms. Mickens. I'm going to take you back to April 4, 1992, last year. Does that day have any significance to you?

A. It's my birthday.

Q. Do you recall what happened on your birthday last year?

A. Well, we got up in the morning, and Walter, he fixed us breakfast.

Q. Was Walter living with you at that time?

A. Yes.

Q. Do you know what time Walter got up?

A. He usually get up before seven.

Q. Was this day any different from the other days?

A. No.

Q. Is it also that day that you learned he had been arrested that evening?

A. That evening after he didn't come home; yes.

Q. Now, where was Walter living during the period say January, 1992, through March and April of 1992?

[872] A. He was living with me off and on.

Q. Was he living with you during the month of March of '92?

A. Yes.

Q. And where was that?

A. 1115 Garden Drive.

Q. Did you have any rules or conditions for Walter if he lived with you?

A. Well, we made rules that he would always be in before dark.

Q. Okay. Did Walter keep those rules?

A. Yes, he did.

Q. Now, going back to the week prior to your birthday, was Walter living with you at that time?

A. Yes.

Q. Do you recall if he was there on the night of March 28th?

A. Yes, he was.

Q. What time would that have been?

A. Well, he left during the day, but he was back in before dark.

Q. How about March 29th?

A. He was home.

Q. March 30th?

A. He was home.

* * * *

DIRECT EXAMINATION

BY MR. KEELING

[878] Q. You're Walter Mickens, Jr., correct?

A. Yes, sir.

Q. Mr. Mickens, have you ever been convicted of a felony?

A. Yes.

Q. Do you know how many times?

A. Five.

Q. Okay. Now, Mr. Mickens, going back to the day of April 4, 1992, do you recall that day?

[879] A. Yes.

Q. Anything special about that day?

A. Nothing other than my mother's birthday, me going up town and getting chicken and coming back home to celebrate my mother's birthday with my father and a friend of the family.



Q. What time did you get up that day?

A. Approximately 6, 6:30.

Q. It was later that evening that you were arrested; is that correct.

A. Yes, sir.

Q. And what were you wearing when you got arrested.

A. I was wearing a thermal navy blue—thermal navy blue hood and a blue—red, white and blue ski jacket.

Q. Okay. Did you keep those clothes on during the time that you were on the seventh floor of the Police Station?

A. The whole time.

Q. Okay.

A. Until they took my clothes.

Q. Now, do you recall being interviewed by the police?

A. Yes.

Q. You recall talking to Detective Seals or Sergeant Seals?

A. Sergeant Seals.

Q. Do you recall him saying anything to you?

A. Well, he asked me quite a bit of questions concerning [880] the death of Mr. Hall. He tried to convince me that I was the person that killed Mr. Hall.

Q. Did he say he was going to do anything?

A. Well, he was very upset because I guess I wasn't responding to his questions, and in the process of what he said while he was talking to me he told me, he said, 'cause it was only me and him in there, he said he was going to do whatever he have to do to make sure I get found guilty for this crime, and he also stated that he would be there on the day that they pull the switch on me and electrocute me.

Q. Mr. Mickens, do you recall the conversation you had with him? You heard him on the stand; is that correct?

A. Yes.

Q. What did you mean when you said that to him?

A. Well, they was in the process of typing those charges up to give to me for Mr. Hall, and in the process of the

detectives out there typing the charges, he misunderstood me very well, and to a point that he said that I made a statement that I accept the charge, so thereafter I'm guilty. I said the only reason I'm accepting these charges is to have them to show to a lawyer when I be given one.

That was my words to Sergeant Seals. I did not accept those charges and the remarks of saying I was guilty of anything. I said I'm simply accepting these charges to have to show that I was charged for the crime that was placed on me.

[881] Q. Now, Mr. Mickens, where were you living in March and April, 1992?

A. I was living with my mother.

Q. Did she have any rules or conditions for you living there?

A. Yes, sir.

Q. And basically what were they?

A. Basically, the rules was she just got finished stating, you know, being in before dark because the area that we lived in and the close knit that me and my mother between us, places I went, I would have called her to let her know my whereabouts so she wouldn't worry about me.

Q. Now, Mr. Mickens, did you follow those rules?

A. Yes, I did.

Q. And do you recall where you were on the evening of March 28th, 1992?

A. March 28th? I went to visit my brother. I went to visit my aunt, and I rode my bike around. Later on that night I was back at home like I normally be.

Q. Do you know what time you were home?

A. Around 8:30, 9:00 o'clock.

Q. Where were you March 29th?

A. Same thing, I had most—

Q. How about March 30th?

A. Same.

[882] Q. Mr. Mickens, did you kill Timothy Jason Hall?



A. There is no way. I could never in my entire life do to another human being as such as what I've been charged with.

Q. Now, Mr. Mickens, one other thing. Do you recall being in the lockup with Mr. Cyphrain or Brister, whatever his name is?

A. That's the gentleman that was sitting up here the other day?

Q. Yes. Do you remember being in the holding cell with him?

A. I remember being in there with him.

Q. Do you recall talking with him in the holding cell?

A. I remember talking to him.

Q. Do you remember telling him anything?

A. I told him that I was being accused of murder and sodomy.

Q. Did you tell him you did it?

A. I didn't say anything beyond that.

Q. Did you ever say the words, "Which I did"?

A. No, sir.

Q. Did he tell you why he was in there?

A. He told me he was in there because him and his girlfriend and some friends that lived in the apartment houses where he was staying at, she was having some problems, and he was arrested, and he was telling me about me about how the [883] officers was hounding him in a rough way. I told him—

Q. Thank you, Mr. Mickens.

A. Okay.

MR. KEELING: No further questions.

THE COURT: You may cross.

MR. GWYNN: May I approach the witness, Judge?

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. GWYNN:

Q. Let me show you what's been elicited as Commonwealth's Exhibit Number 15, Mr. Mickens. Is that your bike?

A. It used to be.

Q. Used to be?

A. It was the bike that Charlie and I, Lockhart, originally brought to my house to give to me from another friend.

Q. You used to ride that bike; did you not?

A. Yes, I did.

Q. When did you start riding this particular bicycle?

A. I started riding that bike sometime the middle part of March.

Q. What happened to it?

A. Early part of March I stopped.

Q. What happened to it?

[884] A. I traded it to another fellow for that black dirt bike.

Q. Traded?

A. Yes, sir.

Q. So, when Vincent West said on March 28th about 8:00 o'clock he saw you riding this bicycle near Newport Towers, that is not correct?

A. Mr. —

Q. Just try to answer my questions; yes or no?

A. —Gwynn.

Q. Is that—just answer my questions; yes or no. Is that right or not?

A. I can't recall because I don't know him.

Q. All right.

A. So, I can't recall that. To answer your question with a yes or no, I can't say that because I don't know that particular person that you're talking about to the point I can say that.

Q. So, you don't know. Is your answer then that you don't know whether or not on Saturday night, March 28th,



between 8:00 and 9:00 o'clock you were in that Christopher Newport Park on that bicycle? You don't know where you were or not?

A. I can't say that.

Q. You can't say if you were?

[885] A. I can't say if I were.

Q. All right, and you didn't know Timothy Hall; did you?

A. No, not at all.

Q. Never seen him before?

A. No, sir.

MR. GWYNN: Now, let me see the tennis shoes. May I approach the witness, Your Honor?

THE COURT: Yes, sir.

BY MR. GWYNN:

Q. I wanted to show you what's been marked Commonwealth's Exhibit Number 13. Take a look at the shoes. You ever seen those shoes before?

A. I seen those shoes when they were shown to me in preliminary hearing.

Q. All right, sir. Was that the first time you saw them?

A. Yes, sir.

Q. You know Mike Jacobs?

A. I have seen him before.

Q. You have seen him before court. He knew your brother?

A. He knew my brother.

Q. When was the first time you'd seen Michael Jacobs?

A. I seen Mike maybe once or twice.

Q. He knows who you are; doesn't he?

[886] A. He know that I'm Peanut's brother.

Q. All right, sir, and he said that he bought these tennis shoes right here from you. You heard him say that?

A. Yes, I did.

Q. That's not true; is it?

A. No, sir.
Q. He's lying?
A. Yes.
Q. All right. Now, does Michael Jacobs have anything against you, Mr. Mickens?
A. Mr. Gwynn, I wouldn't know if he had anything against me personally or not because I don't have anything against him. What I don't understand is why. I don't understand why, but as far as having anything personal against him and me having something personal against Michael, I don't hold anything against him because whatever he did, he did it for whatever reasons, but I don't hold anything against him.
Q. As far as you know he doesn't hold anything against you, does he, as far as you know?
A. Like I said, Mr. Gwynn, I don't know what was Michael's reasons for doing what he did. As far as we holding anything against one another, I don't hold anything against him personally.
Q. Now, Mr. Cyphrain, you said you talked to him in the holding cell; is that right?
[887] A. Yes, sir.
Q. What did you say to him?
A. I simply told him I was being accused of murder and sodomy.
Q. And—all right, sir, and did you say to him, "They said I stabbed him a 140 something times"?
A. I told him that the detective said that.
Q. All right, sir, and did you say after that, "Which I did"?
A. No, I didn't.
Q. You did not say that?
A. No.
Q. Did you also say, "They say that I took these tennis shoes and sold them to a guy"? Did you say that to him?
A. Yes.



Q. All right, sir. Did you say to him after that, "Which I did"?
A. No.
Q. You did not?
A. No.
Q. So, Mr. Cyphrain is lying, also?
A. He's not lying of me saying that I'm talking about the tennis and the nature of the crimes that I was accused of. What he is not telling the truth about is that talking underneath my breath.
[888] Q. He's not telling the truth about saying you were saying, "Which I did"?
A. No.
Q. He's lying about that?
A. Yes.
Q. All right, sir, and do you know whether or not Mr. Cyphrain has anything against you?
A. I surely should hope not.
Q. Had you ever seen him before prior to March 26th in lock up?
A. I seen him once. That was in a holding room I never seen him before in my life.
Q. And you haven't seen him since then until yesterday right?
A. Yes.
Q. You ever lifted weights—
A. Yes.
Q. —Mr. Mickens?
A. Yes.
Q. How often would you lift weights when you used to lift?
A. Maybe twice a week.
Q. How long did you lift?
A. Maybe anywhere from an hour to 45 minutes.
Q. For what length of time?
[889] A. From an hour to 45 minutes.

Q. Over a period of months, years?
A. Off and on, off and on.
Q. For how long?
A. Maybe eight, nine months, something like that.
Q. All right, sir, and back on April 4th you were a little bigger than you are now?
A. No—April 4th?
Q. Yes, sir.
A. I weighed 146 pounds.
Q. I mean in terms of your weight lifting?
A. No, I weighed 146 pounds.
Q. Okay. You smoke, don't you, Mr. Mickens?
A. Yes.
Q. All right, sir, and what brands do you smoke?
A. I smoke Bugle rolling tobacco, and if I don't have that I smoke Marlboros and Winstons.
Q. You never had smoked Dorals?
A. No, sir.
Q. Never in your life?
A. No. Closest thing I ever smoked as far as anything other than Winstons or Marlboro or Bugle rolling tobacco would be a cigarette called Bucks.
Q. Do you drink beer?
A. Yes.
[890] Q. Now, what exactly did you say to Sergeant Seals? Let's take Sergeant Seals' testimony. What exactly did you say to him when he read those charges to you?
A. He was mostly doing all of the talking, Mr. Gwynn. He was doing most of the talking. What I said to him throughout all of that interrogation that I was going through, I said to him that, "Isn't it my right to have a lawyer present," and they told me that we got a few questions to ask you first.
Q. Sergeant Seals told you that?
A. Yes, sir.
Q. All right. All right, sir, and did you say to him, "I accept these warrants I accept these charges"?



A. I said, "I accept the charges, the warrants, so I could have them to show to a lawyer."
Q. Those were your exact words?
A. That was my words.
Q. All right, sir, and what did he say?
A. He just kept writing.
Q. Just kept what?
A. He just kept writing.
Q. Just kept writing?
A. Yes, sir.
Q. And what else did you say?
A. I didn't say mostly anything except for a few things. [891] I told him that I accept the charges simply because I needed them to show to a lawyer when I was given one.
Q. All right, sir, and did you say to him, "Mother fucker, if I told you I accept the warrants that means I'm guilty; don't it?"
- A. Mr. Gwynn, with respect for the jury and the Judge and the courtroom, I can't begin to understand why Mr. Seals would say such a thing. I didn't have any reasons to cuss at him about anything because I didn't feel like I was guilty of anything, but I tried to cooperate with them, but they constantly harassed me.
Q. So, then you're answer to my question then, Mr. Mickens, is no, you did not say this; is that right?
A. I didn't cuss him out.
Q. I didn't ask him whether you cussed him out. I asked you if you ever said, "Mother fucker, if I told you I accept the warrants that means I'm guilty; don't it?" Did you say that?
A. No, sir.
Q. Did not?
A. No, sir.
Q. So, Sergeant Seals is lying too?
A. I don't want to say Mr. Seals is lying. I simply want to say that I do not recall myself saying those words on that

paper. I don't remember myself saying that. I'm the one [892] sitting in there being interrogated.

Q. I'm trying to find out if you said it or not.

A. I did not say it.

Q. Did not?

A. Didn't say it.

Q. So, Sergeant Seals is not telling the truth?

A. Not about that cussing.

Q. Now, when you—did you see him writing this down?

A. He was writing.

Q. This is Exhibit Number 21?

A. He was writing.

Q. Did you look at this?

A. No, sir.

Q. You did not?

A. I didn't see anything.

Q. Did you say to him, "This doesn't mean I confess." Did you say that?

A. I don't recall saying that.

Q. You didn't say that?

A. Mr. Gwynn, I said to him because they was in there typing these charges up on me that they said they was going to place on me.

Q. Yes, sir?

A. And I said, "Well, since your all doing that, I accept the charges simply because I wanted them to have to show [893] to a lawyer when I was given one," and I had been interrogated at that time, I would imagine, for at least 12 or 14 hours constantly. At the time that Sergeant Seals approached me with the pictures of Mr. Hall and the questions that he asked, I had been in that one little room from the time I was picked up until the next morning which was about 14 to 17 hours of constantly interrogation from one officer to another. I believe I might have got in between 15, 20 minutes of rest. Seemed like every time I held my head



down someone was always in there interrogating me on something that I didn't have any knowledge of whatsoever.

Q. So, your testimony then, Mr. Mickens is that one detective after another for 14 to 17 hours talked to you; is that right?

A. With the addition of 15 to 20-minute breaks, plus the break that they took to take me down there to Riverside Hospital to take the hair samples and the blood.

Q. That was about two hours, wasn't it, two or three hours?

A. I wouldn't say it was that long, Mr. Gwynn.

Q. Other than that, it was one detective after another after another coming in and talking to you; is that correct.

A. Yes, sir.

Q. Now, let's go to what Detective Mitchell said. Now, do you remember Detective Mitchell telling you that they had [894] found some seminal fluid and hairs at the crime scene and asking you did you know what DNA was? Do you remember that?

A. When I was brought over to jail early that morning—

Q. Mr. Mickens, let me stop you. I'm trying to frame my questions so you can answer me yes or no. If your lawyer wants to give you the opportunity to explain, I'm sure he will, but my question is do you remember Detective Mitchell telling you that we found some seminal fluid and hair at the crime scene and asking you if you knew what DNA was?

A. Yes.

Q. You remember that?

A. Yes.

Q. He did ask you that?

A. Yes.

Q. And broke out into a sweat at that time?

A. Yes, I remember him saying that.

Q. Did that happen?

A. No, sir.

Q. Did not happen?

A. I wasn't breaking out in a sweat dripping and running from my forehead.

Q. So, Detective Mitchell is not telling the truth either?

A. I might have been sweating, but I was—he said I [895] was sweating and sweat was dripping from my forehead. It wasn't like that.

Q. So, Detective Mitchell then is not telling the truth?

A. He is not telling the truth to a point that he said I was dripping with sweat.

Q. All right, sir. Now, Detective Mitchell also testified that he said to you, "I know you killed this boy," and you said, "I didn't kill anybody." You remember that?

A. Yes.

Q. All right, sir, and he then asked you, "If you killed him, did he do anything to provoke you?" Do you remember that?

A. No, sir.

Q. Don't remember that?

A. No.

Q. And do you remember you then said, "If I killed anyone it was without provocation?

A. No, I didn't.

Q. Didn't say that?

A. No, I didn't.

Q. So, Detective Mitchell is lying about that, too?

A. I had no reason to say anything to him like that; no, I didn't.

Q. So, Detective Mitchell then is lying about that also; is that right?

A. Yes, sir. Mr. Gwynn—

[896] Q. Just try to answer my questions, Mr. Mickens; okay?

A. Okay.



MR. GWYNN: I don't have any other questions of this witness, Judge.

THE COURT: Anything on redirect?

## REDIRECT EXAMINATION

BY MR. KEELING:

Q. Mr. Mickens, when you were in the interview room you testified you had on several layers of clothes; is that correct?

A. I had on thermal—I had a blue thermal on, I had—

Q. Thermal what?

A. Thermal sweatshirt, if you want to say a T-shirt, thermal T-shirt. I had a thick navy blue hood on plus a real thick red, white and blue ski jacket.

Q. And you had that on the whole time?

A. The whole time until they took my clothes from me.

Q. And you recall whether you were talking to Detective Seals?

A. Yes.

Q. And you recall getting upset when he started writing things down?

A. I got upset because they kept on—they kept on drilling me with the fact that I had did something I know I [897] didn't, and I didn't know what to say. I couldn't tell him I didn't answer their questions because I didn't know anything what they was talking about. I had no knowledge of Mr. Hall's murder. They kept on persisting that I knew something, and I got upset to the point I told him that I don't want to talk no more, I want a lawyer, and that's when he told me—

Q. Now, when you were talking to him, that's what you were thinking; is that correct?

A. Sir?

Q. Is that what you were thinking when you talked to Seals?

A. About having a lawyer present? Yes.

* * * *

[900]

CROSS-EXAMINATION—SERGEANT DAVID SEALS

BY MR. KEELING:

Q. Sergeant Seals, do you remember saying anything like, "I'll do anything in my power to convict him"?

[901] A. In the interview with Mr. Mickens I definitely told him I was going to do everything in my power to investigate this case to prove the person responsible for this death was proven guilty of it.

Q. And there were a number of detectives who had access to interviewing him in this process or to transport him to different places?

A. Yes, sir, there was.

Q. So, he was always in police custody during this period?

A. The entire period of time, from the time he was stopped at 33rd and Huntington until the time he was placed in the jail on April 5th, he was in police custody the entire time.

Q. Thank you.

THE COURT: You may stand down. Thank you, sir.

THE WITNESS: Thank you, Your Honor.

THE COURT: Do not discuss the case with anyone or permit anyone to discuss it with you. Please call your next witness.

(Witness excused)

* * * *



[906]

CROSS-EXAMINATION—DETECTIVE WILLIAMSON

BY MR. KEELING:

Q. She talked about cigarettes being different. Did she say something about the filters, also? Can you look at that, what she actually said, Page 29?

A. Okay. "He smoked any kind of cheap brand of cigarettes, no filter tips. I don't think he smokes no filter tips. I've never seen him smoke filter tips."

Q. Now, this interview was done in her home; is that correct?

A. That's correct.

Q. Her son had already been charged with this crime?

A. That's correct.

Q. Did she appear upset to you?

A. She didn't really appear to be upset. I think it was more along the lines of she was possibly confused as far as what was taking place. She didn't really understand what was going on.

Q. So, she was confused; is that correct?

A. As far as being confused on what she was telling me in the statement, I did not get an understanding she could be confused on what she was telling me she did about the activities of her son.

[907] Q. But you said she appeared to be somewhat confused with you there and taking the statement and all the other events going on?

A. She did not seem confused when I asked her about the activities of her son; no, sir. She did not seem confused.

Q. In fact, on Page 9, if you could look at Page 9, about midway down when she said, starts with, "I can't remember".

A. Correct.

Q. If you could read that, please.

A. "I can't remember so much, so much. He went to the movies one night, and I'm trying to think, I believe it was

Saturday night that he went out to the movies. I just can't remember, he went to the movies Saturday night with Sarah Johnson, and he stayed with her at her house."

Q. And she just told you that he'd been at her house just above that; is that correct?

A. Yes, sir.

Q. That is confusing right there; isn't it, Officer?

A. I can't say if it is or isn't. That is what she was telling me in response to the questions.

MR. KEELING: Thank you.

* * * *

[910] THE COURT: Suppose the jury determines that the Commonwealth has not proven to their satisfaction that the Defendant is guilty of attempted forcible sodomy; wouldn't there be a finding for first degree murder?

MR. GWYNN: Yes, sir.

* * * *

[914] MR. KERNS: It was my proposal tht he only be given a capital murder instruction and not a first degree, but based on the comments that the Court made a few moments ago, I think I might be—

THE COURT: I think you're going to have to instruct them on both of them, aren't you? If they find him not guilty of attempted forcible sodomy either prior to or subsequent to the death of the Defendant but proved that he—that the Commonwealth has established his guilty on the Murder One, then I think that this is a proper statement of the law; isn't it?

MR. SAUNDERS: Yes, sir.

* * * *

INSTRUCTION 7

The Defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:



(1) That the defendant killed Timothy Jason Hall; and

(2) That the killing was willful, deliberate and premediated; and

(3) That the killing occurred in the commission of, or subsequent to, attempted forcible sodomy.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty of capital murder.

HOWEVER

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the killing occurred in the commission of, or subsequent to, attempted forcible sodomy, but you find that the Commonwealth has proved beyond a reasonable doubt:

(1) That the defendant killed Timothy Jason Hall; and

(2) That the killing was malicious; and

(3) That the killing was willful, deliberate and premediated;

then you shall find the defendant guilty of first degree murder.

If you find the defendant guilty of first degree murder, then you shall fix his punishment at:

(1) Imprisonment for life; or

(2) A specific term of imprisonment, but not less than twenty [20] years; or

(3) Imprisonment for life and a fine of a specific amount, but not more than $100,000.00; or

(4) A specific term of imprisonment, but not less than twenty [20] years, and a fine of a specific amount, but not more than $100,000.00.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of first degree murder, then you shall find the defendant not guilty.

* * * *

[928] The Court will now explain to you—will explain to you the verdict options in detail in further instructions. The Court will summarize and explain the verdict forms as follows: Should you find the Defendant not guilty of attempted forcible sodomy, then you should also find him not guilty of capital murder because the Defendant cannot be found guilty of capital murder without a finding of guilty of attempted forcible sodomy, and you should so indicate not guilty on the appropriate verdict forms, but under such circumstances, that is, you have found, the Defendant guilty—not guilty of [929] attempt forcible sodomy, you shall then have to consider your verdict as to whether the Defendant is not guilty or guilty of first degree murder, and should you find the Defendant not guilty, you shall so indicate not guilty on the appropriate verdict form.

However, should you find the Defendant guilty of first degree murder, that finding of guilt shall be indicated on the verdict form, and then you shall also fix his punishment an indicate the same in the place provided for on the verdict form.

* * * *

[934] Instruction Numbered 7: The Defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime: One, that the Defendant killed



Timothy Jason Hall; and, Two, that the killing was willful, deliberate and premeditated; and, Three, that the killing occurred in the commission of or subsequent to attempted forcible sodomy.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the Defendant [935] guilty and shall not fix the punishment until your verdict has been returned and further evidence is heard by you. If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the Defendant not guilty of capital murder.

However, if you find that the Commonwealth has failed to prove beyond a reasonable doubt that the killing occurred in the commission of or subsequent to attempted forcible sodomy, but you find that the Commonwealth has proved beyond a reasonable doubt; One, that the Defendant killed Timothy Jason Hall; and, Two, that the killing was malicious; and, Three, that the killing was willful, deliberate and premeditated, then you shall find the Defendant guilty of first degree murder.

* * * *

## CLOSING STATEMENT

### BY MR. GWYNN

[942] First, we know that Timmy, when his body was found on March 30, 1992, he was nude from the waist down. He didn't have on any underwear. He didn't have on any pants. Raheem Gordon said he had on a pair of jeans and underwear, with T. Small witten on the band that Raheem gotten from someone, in the water near where Timmy's body was found.

Timmy was lying face down on a mattress. His legs were spread 12-inches apart. Negroid pubic hairs, four, three of them which had the roots in them, showed they'd been forcibly removed, were found on Timmy's buttocks. Semen

was found on the mattress where Timmy was found. A white milky substance was found on Timmy's buttocks. Also, something I left out was that there were transfer smears of blood on Timmy's thighs. You remember Sandy Cleary telling you about that.

* * * *

## CLOSING STATEMENT

[969] MR. SAUNDERS: Thank you, Your Honor. Ladies and gentlemen, I appreciate the time and effort you have put into this case, and I'll say that I doubt very seriously if I would [970] come anywhere close to the eloquence of Mr. Gwynn in his closing statement to you. Mr. Gwynn asked you to look at the facts of this case and to look at the people on the witness stand and not speculate. Then he asked you to speculate in his closing statement.

On a number of times he's asked you to speculate. He's asked you on—he's told you I'm going to ask you to speculate whether Mr. Walter knew anything about a knife before because whatever newspaper articles may have been out, he's actually asking you to speculate that nobody ever read the articles. Now, he wants you—he told you he's going to build a case on circumstantial evidence, that you would have all this evidence that you could use to tie in Mr. Mickens, and he's pointed out to you the DNA, he's pointed out to you the hair comparisons, he's pointed out to you that Mr. Scholberg told you that the hairs were microscopically similar.

Mr. Scholberg also told you that it's not positive identification, it's subjective opinion. It's looked at through a microscope. He also told you that in cases, known samples, at least four or five times a year are so similar that he can't call it. That is where he's got two known samples. You heard Doctor Blake tell you that the DNA from that hair could have come from one out of six black people.



Now, we don't—Mr. Scholberg told you we don't have database on hair. We don't know how many blacks have almost [971] the same characteristics, so you can't call it. We do know that one out of every six blacks have the DNA at that one location on that one chromosome.

Remember all that nice stuff they told you? Each nuclide cell has 46 chromesomes. The other DNA performed by the laboratory, Ms. Vanty, was perfectly candid. What they are looking at is, again, one location, one chromosome. She checked four different locations, two of them she couldn't call, they were inconclusive or couldn't call, the Commonwealth tried to get her to say that that did not exclude Mr. Mickens, that you recall it also didn't include on the two, she could not call.

Remember what she is looking at? She's looking at the spaces that separate the genes, but at the same time she doesn't know how many genes there are, so we don't know how many spaces there are. She used FBI statistics, but she admitted that the National Research Counsel has criticized those statistics and one of the basic criticisms, as she admitted, is they don't have enough samples. You're going to have to gage, you're going to have to weigh it. One of your jobs is to weigh that type of evidence.

Now, you also heard from the DNA experts that DNA is very viable. Remember Doctor Blake and Ms. Mihalovich? The oldest DNA sample they were successful in using was 17 years old. Has anybody told you how long those cigarette butts were [972] there? Nobody's told you that because they can't. Has anybody told you how long the stains were on that mattress cover? Nobody's told you that because they can't. Remember something else Mr. Scholberg told you? He was asked to examine the other pubic hairs, other black pubic hairs which he found excluded Mr. Mickens, but where did he get them from? Off the mattress cover. Now, isn't it fair to infer that if there are other black pubic hairs on that mattress

cover that mattress cover had been used for something for some time?

Now, we go all the way back to the beginning. Mr. Basford walking down the beach, and, you know, his testimony demonstrates to you that people remember things the way they think they saw. What do you think drew his attention to that area? A mattress standing up, not the mattress the body was found on but a mattress standing up.

Now, we know from the officers at the scene, the crime scene, there wasn't a second mattress, but that is the way he remembers it. So, he's come in and told you the way he remembers it which is perfectly honest testimony, but it's—that is just the way he remembers it. We know there wasn't a second mattress. You have to keep that in mind. People testify the way they remember things.

Now, Mr. Jacobs, you saw Mr. Jacobs on the stand. You heard what he does or what he used to do. Remember also what you saw on the stand was not Mr. Jacobs in March or April [973] of 1992, he'd already been, as he told you, took 21 days of drug rehab. He knew Mr. Mickens' brother. He had seen Mr. Mickens. Now, he told you, "They told me I got a dead man's shoes on." The Commonwealth has told you vice squad officer grabs him and brings him down. He'd been drinking the night before, done heroin before the sale, this was the night before the sale, the same day before he was supposed to have bought these shoes off Walter, he'd followed his same procedure.

Now, that was not just the procedure he did on those two days. If you remember, that is what he did almost every day, drank, used heroin almost every day. Now, you're dragged into the Police Department, you're shown a series of pictures, they told you you got dead man's shoes on. Going to pick out somebody you see, whether or not he really knows who sold him the shoes is for you to gage, but you have got to gage by what he said on the stand.



Remember, he couldn't even recall who his attorney was in December of '92, couldn't recall the terms of his plea agreement that he had in December of 1992, but he recalls very clearly the sale of these shoes to him, and it takes 15 minutes, $5.00. He had some shoes on, that's true.

Now, we get to how those shoes are identified as the shoes that Timothy Hall was supposed to have had on. We get to Raheem Gordon's testimony, and you've been told or you read your instructions, and you gage the credibility of the person [974] on whether or not there are any inconsistent statements that may have been made by that person. We find that Mr. Gordon gets on the stand, and he's gone out to the party, he gets there, Timothy drops him off 6:30 or 7:00, something like that, and he goes back. He tells you that Timmy is dressed in a certain manner.

He goes back to his apartment, on direct evidence, about 8:00 or 9:00 o'clock that evening from the party to go into his bedroom, the door is locked, can't find his key. He goes back to the party. The next morning, 9:00 o'clock, comes in the apartment and the bedroom door is unlocked, and the clothes are in there that Mr. Hall was originally wearing indicating, of course, the inference being that sometime after 9:00 o'clock Mr. Hall changed clothes.

You remember in my opening statement, I told you that the evidence would show, and the only way you could make a reasonable inference you could draw would be it was after 11, and when Mr. Gordon was confronted with the transcript of his own testimony of July of 1992, at preliminary hearing in this matter, his testimony on direct evidence for the Commonwealth was that he left that apartment at 11:00 p.m.

Now, the inference there is that Mr. Hall changed his clothes after 11:00 p.m., and it's the memory in July of '92 that is going to be a whole lot better than it is now unless, of course, you have talked with the two witnesses who claim to [975] have seen Mr. Mickens in the park at say 7:00 or 8:00 o'clock, and what did Mr. Gordon tell you? He had talked to

those witnesses. He also had been over his testimony, which is perfectly legitimate, ladies and gentlemen. He'd been given the opportunity five or six times, and the last time within a week to review what he had told the Commonwealth and the police.

Now, he's a friend of Mr. Hall's, had lived there for at least some time, and he's interested in seeing whoever killed Mr. Hall punished. That is what he told you, but the Commonwealth doesn't have anybody else but Mr. Walter here to pointing to. That is why they are here, that is the only person they got. Of course, he has an interest in the outcome of this case. An innocent man has interest anytime he's charged with any kind of crime; whether it's jaywalking, parking, or in this case capital murder.

We get to Mr. Brister, the Commonwealth's—the Court has told you or will tell you and has told you in the instructions you are entitled to use your common sense. Now, ladies and gentlemen, remember you have been told that Mr. Mickens was arrested on April 4, 1992, for capital murder. Now, in using your common sense in gaging the likelihood that in March, on March 26, 1993, almost a year after being charged with capital murder, Mr. Mickens is going to talk to somebody in a holding cell who he has never seen [976] before in his life, and is going to say, "Which I did, which I did."

Well, ladies and gentlemen, Walter told you he saw the guy and he told him what he was charged with. That is normal procedure sometimes, but to believe that he is going to say after having been charged with these crimes for a year to a man he'd never met, "which I did," we can't show any reason for Mr. Brister to come in here and say that because we don't know Mr. Brister. He's from Louisiana, you know, and he shows up what? When does he show up? Sunday before this trial starts, and what keys him in? He told you on the stand he'd seen all the other people out, but he hadn't seen Mr. Mickens out.



Come on, ladies and gentlemen. You use your common sense in gaging whether or not you can actually believe that that kind of thing took place. I mean, you know, television on Perry Mason, I'm waiting for the guy to come back in the door to confess he actually did it. That doesn't happen in real life, ladies and gentlemen.

Now, we get to the point where Mr. Mickens has been arrested, and he's being interviewed by all the police officers. Well, you have to remember that April the 4th, by Mrs. Mickens' testimony, was her birthday. Walter got up at his normal time, about 7:00 o'clock in the morning, a.m., that's on April 4th. He's arrested at 6:30 p.m. He's held with maybe one or two 15-minute breaks by the police until [977] 9:41, 9:30 a.m. the next day.

He'd been up—well, we have to go back because we have to remember Eastern Standard Time changed over to Daylight Standard Time or Daylight Savings Time. He'd been up 25 hours at the time that he is supposed to have made the statements to Detective Mitchell, and, you know, Detective Mitchell tells you, "I wrote this down because it was important, and I wanted to make sure I got it right." Well, ladies and gentlemen, Detective Mitchell also told you the last thing that Walter said to him was, "That doesn't mean I'm guilty."

You see that on there anywhere? You see that on there anywhere? I don't know about you, but when I was in the military and stayed up for 25 or 26 hours, my brain wasn't working too well, and you also remember as I said with Mr. Basford, people remember things as they did when it occurred. When you are up all night, you're tired, you may think you said something or you may think you heard something and be just as honest as you possibly can be because Mr. Basford was as honest as he possibly could be because he said he saw two mattresses because that's what he's thought he saw, and when Walter told you the way he thought things happened, he's as honest as he can be because

that's the way he remembered it happened, but we get to the real meat of this case, and that is the Commonwealth giving you this total circle to enclose Mr. Mickens in and show you beyond a reasonable doubt that he committed these crimes.

[978] Well, we take the commonwealth's evidence for say it's a given, for purposes of argument, that Mr. Mickens was seen in the dark by Mr. West and by Mr. Mitchell. We're not too sure about what time it was because Mr. West and Mr. Mitchell didn't have their act together. one said it was dusk, "It was just dusk when we left to go to the store." One said Raheem hadn't shown up yet. The other one said Raheem was at the party first. He started off, it was about 8:00 o'clock, and then he had to go back up when he got confronted by his testimony that same July preliminary hearing.

All right. It was dusk, it was 7:00 o'clock, either Raheem is there or he is not there. If Mr. Mickens is in the park, it's not a crime, it's a public park. If Mr. Hall isn't there, which he wasn't dropped off, drove off in his car, Mr. Hall was still alive at 11 p.m. After 11 p.m., that's when he went in and changed his clothes. Mr. Mickens was at home, or he could have been in ten-buck-two.

Remember, if he was there at 5:00 o'clock or there at 6:00 o'clock doesn't place you there at 11:00 or 11:30. You have to also recall Mr. Hall, while he was 17 years of age, was well developed, 5-foot-10, good muscle tone, good nourishment, that's what the autopsy report says.

Now, apparently the Commonwealth wants you to believe that Walter got this young 17-year old somehow down a 30-foot bluff onto a mattress and killed him. Apparently carried beer [979] with him while he was doing that, made a big deal about the beer can. You have to use your common sense, ladies and gentlemen. That's a major gap right there in the Commonwealth's case. Simply because you're seen at a given location at a given time doesn't mean you were there three hours later, and how do these people get together? You



heard the police officer's description of how he got down to the murder scene. He climbed down a pipe and had to jump up on this seawall filled in with dirt underneath that parking garage.

Do you honestly believe that Walter could drag Timothy Hall down a 30-foot bluff, force him down there? How did they get down that hill? How did they even get together? These are the kinds of questions that the Commonwealth doesn't want you to think about because the scientific evidence isn't really conclusive. It doesn't—all it says is it could have been Walter. It doesn't say how long the evidence was there. It doesn't give you anything except possibilities.

The real question is, ladies and gentlemen, how did these people get there, and do you honestly believe that my client would force Mr. Hall to be down there? Ladies and gentlemen, I do not believe, but it's your decision, that the Commonwealth has proven this case beyond a reasonable doubt. I think that there are too many gaps in the Commonwealth's case for you to say on this circumstantial case that he's guilty. I [980] don't believe Brister at all. You got to remember he didn't have an I.D. on him, therefore, they had to assign him a docket number. He also had two different names. Well, I don't know about you, but the last time got a ticket I gave them my name, and they wrote on it. That is something, something he's trying to hide there, at least that is the way I infer it, and he is the only one that's telling you that Walter said I did it other than Detective Seals.

As I pointed out to you, Detective Seals, in his major notes, got to leave out or forget to preclude the last statement, the last comment of Walter. The circumstantial evidence is insufficient. It's not there to prove beyond a reasonable doubt, not a probability of guilt and not a possibility of guilt, but beyond a reasonable doubt. Thank you, ladies and gentlemen.

* * * *

BY MR. GWYNN

[988] Tim could have gone down there by himself before he went to the party. He wasn't staying with Raheem. Maybe he went there to think and be alone. You look at the photographs. This is a very secluded area. Look at the one right here, Commonwealth's Exhibit Number 1-B, very peaceful, very serene. Nobody ever said that Walter Mickens forced Timmy down there.

Nobody ever said that he pushed him down there. Nobody ever said or even suggested that he forced him down that 30-foot slope or bluff, as Mr. Saunders said, nobody said that. It could just as easily be that Timmy went down there to be alone and think, and Walter Mickens confronted him down there. He didn't have to force him down there.

* * * *

OPENING STATEMENT—SENTENCING PHASE

[1024] MR. KEELING: Good morning, glad to finally get this started; aren't we? 1.2, 4, 1.2, 4, we have seen that; haven't we? We know some things about Mr. Mickens that people never knew. We knew his DNA, his auto rads, we will hear evidence from the Commonwealth of his prior history, but we don't know Walter Mickens; do we? Nobody knows that man right there, nobody on this jury panel knows that man, and I want you to sit here and listen, and you'll hear evidence of who Walter Micken is, and I think when you hear who the person is and learn who the person of Walter Mickens is you'll be able to make the right choice today. I ask that you keep an open mind, that you listen to his witnesses and to his family and that you make the right choice.

THE COURT: Thank you, sir. Please call your first witness, Mr. Gwynn.

* * * *



CROSS EXAMINATION—DR. LEAH BUSH

BY MR. KEELING

[1038] Q. Now, you testified before as an expert that you could not say whether or not Mr. Hall was conscious; is that correct?

A. No, sir, I cannot say for sure.

Q. And does the fact that there are no defense wounds assist you in that?

A. It would appear since there are no defense wounds that would be most consistent with an unconscious state.

Q. All right, and you would not know over what period of time these wounds were inflicted; would you?

A. I would say, sir, that they are all paramortem injuries occurring about or around the time of death. I can't really. I can't say whether they occurred five minutes before he actually died or within a minute or two after he expired, but they all occurred about the same time. We call it paramortem.

Q. Now, you also really couldn't determine a time of death either; could you?

A. No, sir, we could not.

Q. And it was correct that you said that Mr. Hall had good muscle tone?

A. Yes, he did.

* * * *

DIRECT EXAMINATION

[1080] WALTER MICKENS, JR., called as a witness in his own behalf, having been duly sworn, was examined and testified as follows:

THE COURT: You may examine your client Mr. Keeling.

[1081]

DIRECT EXAMINATION

BY MR. KEELING:

Q. You're Walter Mickens, Jr,?

A. Yes.
Q. How old are you, Walter?
A. Thirty-eight.
Q. Where were you born, Walter?
A. Newport News, Virginia.
Q. Okay. We have heard from your sister and mother and aunt; is that correct?
A. Yes.
Q. Okay. Where did you grow up?
A. Newport News.
Q. And where in Newport News?
A. 27th Street, 10 hundred block, Newport News.
Q. And was that a house?
A. Yes.
Q. And who lived in that house, Walter?
A. Me, my mother and my sister and my brother.
Q. Okay. Did your mom work?
A. Yes.
Q. Did she go to school, also?
A. Yes.
Q. And did other family members help take care of you all while you were little and she was working?
[1082] A. Yes.
Q. Now, where did you go to school?
A. Dunbar, Huntington, Carver.
Q. How far did you go?
A. Ninth.
Q. Did you finish the ninth grade?
A. No, sir.
Q. Why not?
A. Cause of my education skills wouldn't allow me to. I would always get upset when I couldn't, you know, read or do some math or something. I would always let what I couldn't do hinder what I could possibly do.
Q. What kind of learner would you describe yourself as being at that time?



A. Say that again?
Q. What kind of learner; how fast or—
A. Slow.
Q. Did that cause problems?
A. To me it did, yes.
Q. Now, Walter, you started getting in trouble when you were a teenager; is that correct?
A. I started getting in trouble when I was a juvenile.
Q. And what happened?
A. Uh, I guess if I wanted to blame anybody for my troubles I would have to first blame myself. Secondly, I would [1083] blame the conditions.
Q. What were conditions that would upset you during that time?
A. The fact that my mother was the main supporter for me, my brother and my sister, and welfare, my mom took odds and ends jobs to make sure we had food to eat and clothes to wear, and I personally disliked the welfare system to a point that I went out and did things that I sorely regretted, but at the time I didn't have nothing else to do, so I did things on my own, and my mom, she didn't want to accept it at times, but like I said, it was conditions, and I got tired of eating the same food, you know, things of that nature.

I got tired of seeing my mother cry, being upset, being depressed when I never seen anybody abuse her or take advantage of her. I'm a young 11, 12 year-old man, can't figure these things out. So, I said something got to be wrong, and I asked her what is wrong. She always told me everything is okay when I knew it wasn't. So, it starts real early, but I have, since as I growed up, I made mistakes and started to get into drinking beer.

My biggest problem was sniffing glue. Something I thought was everything that was good to me I found out later on that it wasn't. It wasn't so 'cause of everything that went wrong with me. I don't have—I don't blame my parents for anything. I love my family. I blame myself.

[1084] Q. Was your father around during this time, Walter?

A. No, he wasn't, but I don't blame him for anything either.

Q. You didn't finish the ninth grade. Were you able to get any job skills?

A. Well, I went through the opportunity center, and I learned to—I got a skill in painting and little things that I just learned on my own, you know, as I was going through a lot incarceration times, I learned to pick up on certain things naturally, you know.

Q. Most of your adult life you have been in jail; is that correct?

A. Yes.

Q. Have you—did I understand you to have a problem with glue?

A. Well. I stopped sniffing glue, and this last time when I was locked up I was introduced to some paint thinner, and I was doing that for maybe three or four years while I was incarcerated and going through a lot of problems then, seeking help, something I never really got, you know. I O.D.'d back in '91.

Q. What do you mean by O.D.'d, Walter?

A. My lungs collapsed from smelling paint for about three or four days. I think I got turned down on parole. So, you know, I was upset, so I turned to that, and I almost died [1085] from it. So, I had to come to a conclusion that I had to stop, so I made myself stop. It took a lot, but I did it.

MR. KEELING: Thank you, Walter.

CROSS-EXAMINATION

BY MR. GWYNN

Q. Mr. Mickens, in response to one of Mr. Keeling's questions, you said you started getting into trouble as a juvenile; is that right?



A. Yes.

Q. What kind of trouble was that?

A. Well, like I said, under certain conditions I—like I said, I used to see my mom cry, and I used to wonder why, and I never—I never seen nobody, if you ever seen a person cry and never seen anybody beat on you, you wonder what is wrong, why are they crying, and things going on in my mom that was personal to her that I felt, but I didn't know what they was. So, I used to go out, and I used to steal, I used to steal.

Q. Why did you do that?

A. Cause I was a young man and didn't have no education, wasn't able to hold a job at 12 or 11 years old, 11, 12, 13 years old.

Q. Now, how old were you when you started stealing?

A. About 13, I would imagine. I only did it—I only did it because I wanted more food or I wanted—I thought it was going to help. I didn't mean to hurt anybody in the [1086] process. I didn't mean to cause anybody no pain. It's just that I did it, and it was so long ago, I mean I'm 38. That's when I was 13.

Q. Did you get into any other trouble as a juvenile aside from stealing?

A. Except for what I just heard just awhile ago from the school teacher, something I had long forgotten and had long been forgiven of it, and I was hoping and praying that maybe all the people that I may have did wrong to in the past could forgive me, also.

Q. Well, your mom mentioned something about a problem with a paper boy?

A. I can't recall, Mr. Gwynn. I was doing—I was sniffing glue for quite a while. I mean, my mom—she stated she found glue, smelled it on me which is true. I always tried to hide what I was doing to be personal to me from my family members. I didn't mean to cause anybody any harm. It was what I was doing to myself.

Q. Let's go back to the time in '91 when you O.D.'d. Now, you said you had been turned down for parole; is that correct?

A. Right.

Q. How many times during the course of the time you were in the penitentiary were you turned down for parole?

A. Well, I was given 17 years total. I did 12 years, [1087] two months and 19 days, and I was turned down seven times.

Q. All right, sir. You know why?

A. I would imagine my performance—while I was incarcerated, they said the nature of my crimes, something I couldn't change. I got turned down quite a few times on simply the nature of my crime.

Q. Okay.

A. Basically, that was it. I never got no serious charges or nothing while I was incarcerated except for I don't think I ain't got no refusing direct order charges, maybe being in an unauthorized area or something like that, you know, but nothing serious. The Parole Boards, I imagine, think I just wasn't ready to make it.

Q. All right, sir. You made it back in '91, you said, because you almost O.D.'d, and that caused you to stop sniffing that paint thinner?

A. I caused myself to stop after that incident. I didn't want to die, and I felt the next thing if I did—if I kept doing it I would eventually die, and I came to my senses and I stopped, but it took a lot of determination and will power, but I did do it, and I have been drug free ever since 1991.

Q. And you realize then, did you, that human life is precious; didn't you?

A. I always knew human life is precious.

[1088] Q. You always knew that?

A. Yes, sir.

Q. You always knew human life had value; right?

A. Yes.



Q. And you always knew that another person had no right to take another human being's life; didn't you know that, Mr. Mickens?

A. I tried to explain that to the jury, Mr. Gwynn.

Q. Didn't you know that?

A. I know that.

Q. You realize that?

A. I know that.

Q. Now, when you saw your mother crying and saw her depressed, you said you went out and got money; is that correct?

A. Yes, I did.

Q. And you went out and stole from people?

A. Yes, I did.

Q. Did you rob people, too?

A. Yes.

Q. And do you think that justified what you did, Mr. Mickens?

A. I already said it didn't.

Q. Did not?

A. I already said it didn't.

[1089] Q. You said you didn't intend to hurt anybody?

A. Not then and not now.

Q. But you know robbing and stealing from people hurts them; doesn't it?

A. Yes, Mr. Gwynn. All the things that happened to me from a child up until the time I got incarcerated in 1979 I very much paid for that, and I also have asked the Lord to forgive me, and I also asked the Lord if he could make it so that those people that I have did wrong to could forgive me also, and I believe in my heart and soul that if I could be forgiven for the things that I did, I pray to God that they could forgive me, also.

MR. GWYNN: I don't have any other questions of this witness.

THE COURT: Thank you, Mr. Gwynn. Anything on redirect, Mr. Mickens, Mr. Keeling?

MR. KEELING: No, Your Honor.

THE COURT: All right. You may rejoin your lawyers at counsel table, Mr. Mickens.

THE DEFENDANT: Your Honor, if it's possible, may I say something briefly to the jury?

THE COURT: Yes, sir, if it's all right with your lawyers; yes, sir. This is your day.

THE DEFENDANT: I would like the jury to know that I did not willfully, intently or no kind of way kill Mr. Hall. I [1090] know this within my heart. The evidence had allowed you all to believe that I could be that person that did that. I could never do that to another human being. I have did things in my life that was wrong.

I didn't know Mr. Hall. Mr. Hall didn't know me, and his family, my family and I, we are going to have to live with whatever you all decide to do to me for something I know I didn't do.

I will carry that burden within my heart, and I'll pray each and every day that he may rest in peace, that he could find peace, and I would like to apologize to his family which I never knew, but I was asked by Sergeant Seals, he asked me was I capable of feeling remorse, and I told him I was wondering why. I didn't know at the time that a young man had died, and I know at that time that I was going to be charged with it, with his death, but during that course of that they was talking to me, I was charged with it, and I know I didn't kill him.

I know I didn't kill him, and I'm always going to remember that. I might have to die if it's up to you jurors. I might have to spend the rest of my life in prison, but God knows, and I know that I didn't kill him; but like I said it's something I'm going to have to deal with.



I would just like for you all to consider that if you think that my life should be tooken because his life was [1091] tooken. Like I said, God bless you all. Thank you.

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## CLOSING STATEMENT

[1035] THE COURT: Thank you, Mr. Gwynn. Mr. Keeling?

MR. KEELING: Thank you, Your Honor. Ladies and gentlemen, you have a choice. The slate is clean right now. When this trial started, this man told you something. He told you that your service on this jury was a sacrifice, and it has been.

He told you this is probably the greatest sacrifice you could make for your country except in wartime, and I think you believe it. Of course, in wartime you could sacrifice your own life or that of another, but it isn't done lightly. A soldier is trained, easy equipped, he's armed, and he's not sent into battle lightly, but the sacrifice here on the jury, as he said, was for our legal system, but it's deeper than that, its for our society.

We are not a society of an eye for an eye, an arm for an arm, or a life for a life. If you're wrong, you come in this room and you get 12 of your fellow citizens to sit in that box and make a decision. That is the nature of your sacrifice, and it's a big sacrifice to have to make the decision that you're going to make today, whether another man lives or whether another man dies.

You have heard that this is a circumstantial case, and until last Friday you did not know all of the circumstances. As Mr. Gwynn said, until last Friday you did not know Walter Mickens, Jr. You didn't know him, and you [1036] heard the witnesses testify. You heard Sarah Johnson say she knew him when he was a young child in school and then as an adult, that she trusted him, that he was good with children.

You heard from his Aunt Massey who told you that Walter had a tough time, that his mother had a tough time, that she had to raise the family by herself with just help from other family members. You heard from Steve Kiger that said Walter was a model parolee except when he got in trouble again. You heard him say Walter Mickens had no education, no job skills, and there was nothing out there for a person like that.

You heard from Darlene Mickens, his sister, who told you that Walter's problems started behind school, is how she put it. The problems started with school. Just as the Commonwealth has told you, starts with truancy. You heard from his mother. She told you Walter Mickens was born in 1954 and in 1956 Walter's dad left, he was out of the picture. From that point on she had three children to raise, and she told you what she did.

She worked, she went back to school, and she did everything possible she could for her family. She did everything she could. She told you how Walter was a slow learner, but he was never in any special education classes that she knew of. She told you his problems started in school and when he was sniffing glue, but she caught him and she tried to stop him, but she couldn't. She told you that she loved her [1037] son. She told you when he came back the last time, she said, "You can live in my house with these conditions; I want you to follow my rules," and he could do it. She told you all that.

Then you got to meet Walter Mickens, Jr., yourself. You heard him testify his father wasn't around. He didn't have a father. He told you how rough it was with the family, how they all pulled together, how aunts, uncles and grandparents tried to help him, and he told you, just like Mr. Gwynn told you, he got tired of having to eat the same thing every day and not having anything, and he was 13 and 14 and tired of seeing his mother cry. He told you he didn't know why, he couldn't understand it, nobody hit her. You understand why.



He was getting to be a frustrated, uneducated, unskilled man on the street. He didn't know what to do, where to turn. He kept slipping through the cracks, nobody there to help him. Walter Mickens told you that. He told you what it was like, and he told you the crimes he committed, he said he didn't remember robbing that teacher, but he remembered being convicted of it. Where was that robbery? Dunbar Erwin, same school where he went but where he couldn't make it, same school Walter Mickens had gone.

You heard Walter Mickens tell you that when he was in prison he got in trouble for going through an unauthorized area, but otherwise he didn't have problems when he was in the prison system. He had a problem in this jail right over here [1038] with 50 men packed in the room with him waiting for trial. He's not denying that.

Walter Mickens told you that even when he's in prison he sought to escape, started sniffing paint thinner until his lungs collapsed, and then he told you he quit doing it. Why? "Because I didn't want to die." That's what he told you. He didn't want to die. Walter Mickens told you he didn't want to die, so he quit sniffing that thinner. He wasn't going to do it anymore.

Ladies and gentlemen, for you, this is a lifetime experience. Whether Walter Mickens lives or dies, you will carry this with you. This is your decision. The Commonwealth is wrong. You have a decision. You have a choice. You can choose a life, but whatever choice you make you will always carry with you. It is your choice, your personal, individual choice. When you go back in that jury room, you don't sit down and look around at each other and say, "What do we do," because you're not going to live with each other the rest of your life. You're going to live with yourself and you're going to live with yourself and you're going to say, "What am I going to do? This is my decision. What am I going to do?" You can give a life today. You can give a life today, and you saw Walter Mickens on the stand, and I'm

going to leave you with the words he left you; "God help us all." Thank you.

THE COURT: Thank you, Mr. Keeling. Mr. Gwynn?

* * * *

[11] Q. Is there anything you want to tell Judge Stephens today that might influence his decision?

A. Yes, I would. I'd just like to say that I've been [12] thinking about what I have been going through for the last year or so, and I actually really feel like I was placed in a position that made me seem to be a person that I know I'm not, but somehow I just didn't have anyone to really want to listen to what I had to say or couldn't find anybody to believe in me.

I just can't understand the fact that I spend 12 years two months and 19 days of my life in prison for something I was accused of in 1979, to come out here, to fall victim of Timothy Jason Hall's death simply because someone just said they seen me in a park, that I felt that that park was perhaps my park, too, since I was a citizen of Newport News, Virginia, but somehow certain people came in this courtroom, took the stand against me, and said things and made the jury to believe that I was capable of doing such a heinous crime when I knew I didn't, and it really wasn't any evidence to prove that I did kill Mr. Hall, and I know I didn't kill him.

If I did, if I did do that, I would come forward, and I would expect truth because I know I couldn't do that to another human being. I know I didn't do it, but they disbelieve me for whatever reasons, and I'd just like to say that, Your Honor, I feel bad for being in this position, for Mr. Hall, and I pray that he's okay.

* * * *

[34] Before pronouncing sentence, do you desire to make a statement? You're not required to make a statement. This is your opportunity to make a statement if you desire to do so.



THE DEFENDANT: Your Honor, like I stated before on the witness stand, I cannot change the fact that I have a criminal record, and I cannot change the fact that the jury found me guilty, but I know within myself and I know within my heart I didn't commit this crime. If I did commit this crime, all the other crime that was placed on me at the time I was arrested, I'm quite sure that I'd be guilty of those crimes, too.

I stated before that I wished that you have mercy on me and not recommend the death sentence. I know it's left up to you as far as decision is concerned, it's something I shall have to live with, but I have been, like I say, I'm placed in a position where I have no alternative but to do the best I can mentally, spiritually and spiritually to make it through this, and I just—like I say, Your Honor, I can not change the fact that I have a past. I know—I know I didn't do it. I know I didn't do it. Like I say, I'm placed in a position I'm just [35] going to have to deal with it the best I can, and with God's help I hope I can make it and with the mercy of the Court. That is all I have to say.

THE COURT: All right, Mr. Mickens. Before pronouncing sentence with respect to the attempted forcible sodomy conviction, do you desire to give the Court any reason why judgment should not be pronounced against you at this time?

THE DEFENDANT: No, Your Honor.

THE COURT: There being no reason for delay, Mr. Mickens, it is the judgment of the Court that you, the Defendant, Walter Mickens, Jr., be and you hereby are sentenced to confinement in the penitentiary of this State for the term of 10 years, it being the sentence determined and fixed by the jury in its unanimous verdict.

Sir, you have a right to petition for appeal from the judgment of this Court to the Virginia Court of Appeals respecting your having been found guilty of attempted forcible sodomy. The first step necessary to perfect any such

petition for appeal is the filing by you with the clerk of this court of a written notice of appeal within 30 days of this date.

The Court appoints Mr. Bryan L. Saunders, Mr. Warren F. Keeling, the Defendant's trial counsel to represent the Defendant in perfecting, processing and otherwise pursuing to final conclusion Defendant's appeal to the Court of Appeals from the conviction of attempted forcible sodomy and to the [36] Supreme Court of Virginia as the case may be.

Have the record reflect that the Defendant has been personally present at every stage of the proceedings, and that his attorneys, Mr. Saunders and Mr. Keeling, have been likewise personally present and have capably and ably represented the Defendant.

Sir, now, with respect to the capital murder conviction, in accordance with the verdict of the jury rendered on June 4, 1993, the Court found you, Walter Mickens, Jr., the Defendant, guilty of the capital murder of Timothy Jason Hall, a violation of Virginia Code Section 18.2-31, Subsection 5 on. June 7, 1993, the jury returned its verdict on the penalty phase of the capital murder trial and unanimously fixed your punishment at death.

Sir, before pronouncing sentence on the capital murder conviction, do you desire to make a statement? You're not required to make a statement. This is your opportunity to make a statement if you desire to do so.

THE DEFENDANT: Well, Your Honor Stephenson, only thing I have to say about that is I was here in your courtroom when they made that decision, and I heard it very clearly. I feel with the evidence that the Commonwealth had against me, they had no alternative but to pass a judgment of life in prison or death, and what they had in front of them led them someway, somehow to believe that I might have been capable of [37] doing that, and just by that alone, you know, I can't change.



I still feel the same way, Your Honor, about the fact that I know I didn't do it, but for some reason, maybe the evidence that he had and pictures they were showing of his body looked real bad and all, so it made them, somehow made them think that I could have did that, but I know I didn't, and like I say I just maybe hope in the future that all this matter could be straightened out somehow.

* * * *

## CROSS EXAMINATION—SANDRA CLEARY

### BY MR. SAUNDERS

[399] A. We had to go around to the side of the building and walk down the shoreline.

Q. Walk down the shoreline. That is because this is what; a 6 to 8 to 12-foot bluff?

A. Yes.

Q. Are you familiar with where, if there are any stairs, in that area to get down to the beach?

A. The easiest access to the beach would be if you're [400] facing that from the river it's going to be on the left-hand side.

Q. A block or so down, towards, or up towards Denbigh?

A. No. It's just to the left of that building. It's not as apparent on that photograph but—

Q. You said the easiest access?

A. The easiest access.

Q. Are you talking about right here?

A. Yes—no, the other side.

Q. Over here?

A. Yes.

Q. There's still a 12-foot bluff here?

A. Yes.

Q. Are you aware of any stairs, steps in that immediate area?

A. I honestly do not recall. I was able to get my equipment down there.

Q. With help?

A. No, I believe I took all my equipment.

* * * *

CROSS EXAMINATION—DR. LEAH BUSH

BY MR. SAUNDERS

[420] A. No, sir, I have no way to know that.

Q. I'll use the Government's own exhibit here, RS-2-A. When you think of defensive wounds which the Government went through with you, you would normally find them on the hands or the legs?

A. The hands or surface of the forearm or legs; yes, sir.

Q. There are absolutely no defensive wounds here at all?

A. Yes, sir; that's correct. I see no defensive injuries.

Q. That could be due to a number of factors?

A. Yes, sir, it could.

Q. One of those factors could be that Mr. Hall wasn't in any condition to struggle at the time he was stabbed; is that correct?

[421] A. Yes, sir, that could certainly be the case.

Q. The blue contusion around the neck, would you find the contusions if the body was already dead?

A. Do you mean could somebody produce those injuries post-mortem?

Q. Yes, ma'am.

A. It's possible to produce those injuries post-mortem although a great deal of force post mortem would have to be greater than it would be to produce on a living person, and those injuries would have to be inflicted in the immediate post-mortem, meaning a very short time after death, so the blood would still be liquid and not settled. So, it's possible within a very narrow time frame.

Q. In your experience it would be most likely they would be inflicted on a living body?

A. Yes, sir.

Q. These type of wounds, could they not render a body unconscious?



A. Somebody could be rendered unconscious if those wounds indicate pressure on the neck in a chokehold or strangulation-type of fashion.

Q. Now, the wounds that were fatal to the brain, could any of those immediately have rendered Mr. Hall unconscious?

A. Yes, sir. Anytime the brain is injured there is certainly the possibility that somebody can become unconscious [422] due to brain injury.

Q. And there were eight fatal stab wounds to the brain?

A. Yes, sir; seven to the left side of the brain and one to the right frontal area.

Q. And when you say that Mr. Hall could have lived for 30 minutes after the last stab wound up to 40, he could have already been dead at the last stab wound; could he not?

A. It's a possibility; yes, sir.

Q. So, actually you have no real medical way of saying that he was alive or dead the last stab wound or when he expired.

A. No, sir. I don't know how long the stabs took place, whether they took place over a long period of time or whether they were inflicted very quickly.

Q. Mr. Hall was 5-foot-10, 155 pounds; is that correct?

A. Yes, sir, that's correct.

Q. He had normal development for a 17-year old?

A. Yes, sir. I called him well developed and well nourished.

Q. Muscle tone would have been that of a well developed 17-year old?

A. Yes, sir, it was.

* * * *

DIRECT EXAMINATION—STEVEN KIGER

BY MR. GWYNN

[427] A. Mr. Mickens' initial parole period began on October 30, 1973, with a minimum expiration date of

November 21, 1974. The second parole began on July 1, 1979, with a minimum expiration date of January 1, 1980.

Q. All right.

A. The third parole began December 19, '91, with a minimum expiration date of June 19, 1992.

Q. All right. Now, in reference to the parole that began on October 3, 1973, was he successful in completing that parole?

A. No. His parole was revoked on August 16, 1974.

Q. Why?

A. Based on convictions of larceny, armed robbery, grand larceny from a person and sodomy.

Q. Now, was he successful in completing his parole that began on July 1, 1979?

A. No. This parole was revoked on April 11, 1980.

Q. Why?

A. Based on a conviction of sodomy and robbery.

* * * *

DIRECT EXAMINATION—CHARLES SIRON

BY MR. GWYNN

[430] Q. All right, sir, and did something happen to you the early morning hours of February 14, 1974, that caused you to be here today?

A. Yes, sir.

Q. Could you tell the jurors if you would, please, what took place and where you were?

A. Yes, sir. I was sleeping in a dormitory-style facility with approximately 40 to 50 other inmates. I was awoken during the middle of the night with a man attempting to get into my bunk, and the man had a razor blade to my throat.

Q. Did he say anything to you?

A. Not that I can recall.

Q. What happened next?

A. And he forced me to try to take my pants off, but he was unable to do that, so he forced me to come into the bathroom area.



Q. How did he force you into the bathroom, Mr. Siron?

A. He was holding a razor blade to my throat. He told me if I don't come with him he was going to do harm to me.

Q. Did you follow?

A. Yes.

[430] Q. What happened next?

A. He took me to the shower bathroom area and attempted to sodomize me.

Q. And how long were you in this man's presence?

A. Approximately 15 to 30 minutes.

Q. All right. Did he actually complete the act?

A. No, he was unable to.

Q. Now, were you able to get back to your bed?

A. Yes, sir.

Q. Were you injured in any way with the razor blade?

A. Physically no, but psychologically, yes.

Q. Did the man say anything else to you other than when he got you out of the bed he was going to do harm to you?

A. I better not report it.

Q. Did you report it?

A. Yes, I did.

Q. And how many other persons were in that cell area where you were in the jail?

A. I'd say approximately 40 to 50.

Q. Now, is the person that did this to you, is he here today?

A. Yes, sir.

Q. Could you point him out for me?

A. Sitting right over there with the glasses on.

Q. What is he wearing?

[432] A. Looks like a gray suit, gray sports jacket.

Q. All right. This man right here?

A. Yes, sir.

MR. GWYNN: Let the record reflect he's identified the Defendant in this case.

* * * *

BY MR. GWYNN

[435] Q. And what kind of activities had you and your class engaged in during the course of that morning on February 7th?

A. Well, we had been in our room all morning until after lunch. Well, I need to explain. Erwin and Dunbar are two separate buildings, and I was on the faculty of Erwin but was housed in the Dunbar building because of overcrowding. So, we had been in our room all that morning, but that afternoon we had gone to Erwin to the library because the library was over there. You want me to continue?

Q. Yep.

A. When we came back from Erwin we had gone into the room, the children were seated.

Q. What time was it, Mrs. Bunn?

[436] A. This was after lunch. I had gone to my desk and was in the process of putting my pocketbook in the lower drawer when one of the children said, "Mrs. Bunn, there's a man at the door," and when I looked up there was a man standing in the hall looking in the door.

Q. Had you ever seen him before?

A. I don't think so.

Q. All right, go ahead.

A. So, I started toward the door. He came in the door, walking toward me, and I said to him, "May I help you? Is there someone you wanted to see," and he said to me, "I want your pocketbook," and he was holding a knife pointed at me.

Q. How close was he to you at this point, Mrs. Bunn?

A. Well, when I saw the knife I started backing off. He was pretty close, and so I went back to my desk, and I reached down to get my pocketbook, and when I looked up he had walked over to a little boy and was holding the knife just a matter of inches from his head.

So, I thought I better move fast because I don't know what he's thinking at this point, but anyway I got the pocketbook,



put it on my desk. I took out my wallet, took the money out and went over and handed it to him. He did not leave right away. He hesitated, but the room was absolutely quiet. The children were just frightened. Finally, he backed out very slowly. I think he heard a noise or something in the hall, and [437] he left.

Q. What was the reaction of the little boy who had the knife inches from his head?

A. Every child in that room was in fear. They were just startled. He had this expression. If you could hear a pin drop, you could have heard it that day. Those children were just frightened.

Q. What was your reaction?

A. Fear and disbelief that this could happen in a Newport News Public School, that someone could walk in and threaten a teacher and rob a teacher in front of the class.

Q. How long was this man actually in your classroom?

A. It seemed like forever, I really don't know.

Q. I'm sorry. Go ahead.

A. He was—well, I really don't know. I couldn't tell you time-wise how long he was in there.

Q. What did you do when he left?

A. Well, we were all in a state of shock. I think the children looked at me, and I looked at them. I said, "I can't believe this has happened." I kept saying it, "I can't believe this has happened." So, I sent one of the children to the office for Mr. Bennett who was principal of Dunbar because I figured they were closer to me than Erwin, and they were very quick to come down to see what had happened and to check on us.

* * * *

[442] MR. GWYNN: This will be Number 4. Let the record reflect, please, that on June 3, 1974, Walter Mickens was convicted of sodomy and that he received three years in the penitentiary. May I approach your clerk?

THE COURT: You may.

MR. GWYNN: RS-4, Mr. Clerk?

THE CLERK: Yes, sir.

MR. GWYNN: Also, please let the record reflect that on June 3, 1974, here in the City of Newport News, Walter Mickens was convicted of robbery and was sentenced to six years in the penitentiary to serve.

THE CLERK: RS-5.

MR. GWYNN: Yes. The next conviction, Judge, is a conviction for attempted larceny from the person. This was on the 16th day of March, 1973, Walter Mickens was convicted and sentenced to three years in the penitentiary to serve.

The next conviction, ma'am, is on June 3, 1974, Walter Mickens was convicted of robbery and was sentenced to four years in the penitentiary to serve.

The next, February 4, 1980, in the City of Newport News, Walter Mickens was convicted of sodomy and received 10 years in the penitentiary to serve.

February 4, 1980, Walter Mickens was convicted of robbery in the City of Newport News and sentenced to seven years in the penitentiary to serve.

[443] Last, in connection with this offense, Walter Mickens was convicted of attempted forcible sodomy on June 3, 1993, and was sentence to 10 years in the penitentiary to serve. With the introduction of these documents, Judge, the Commonwealth rests.

(Commonwealth's Exhibit Numbers RS-4, RS-5, RS-6, RS-7, RS-8, RS-9, and RS-10, respectively, were marked for identification and received into evidence.)

* * * *

DIRECT EXAMINATION—DARIUS ROBINSON

BY MR. KEELING

[448] Q. Now, does Mr. Mickens present himself as any problem to you?



A. No, sir.

Q. Do you know whether or not he's been any problem to the system since you've been involved with him to your own knowledge?

A. No, he haven't been a problem to me; no.

Q. Are you in your daily activities—I realize he's an inmate and that you're a correction officer, but do you have any personal apprehension when you're with him or around his presence?

A. No, sir.

Q. Now, if he were to get life in prison without parole he would not get out of the system; is that correct?

A. That's correct.

Q. And if he were to get life in prison what would the procedure be to house Mr. Mickens?

A. Well, based on the nature of his conviction, first he'd go through a class reception center, then based on the nature of his conviction he would be housed in an area of people of the same type of conviction, and as time goes by, he progresses, well, he would probably be put in a less secure area.

Q. So, he would have to prove himself to the system [449] over a period of time before he would be moved to a different population than those such as his own; is that correct?

A. Yes, sir.

MR. KEELING: Thank you, Officer.

CROSS-EXAMINATION

BY MR. DANIELSON:

Q. Sergeant Robinson, how long have you been a corrections officer?

A. Eighteen and a half years.

Q. Eighteen and a half years. Now, you said that after a period of time if someone like Mr. Mickens were to receive a

life sentence, they could eventually be transferred over to where again?

A. A lesser secured area.

Q. How long a time would this be?

A. Anywhere from 4 to 5 to 90 days or longer.

Q. In 90 days he could be—a person who receives a life sentence could be in a less secure area?

A. Yes, he's going to be in maximum security, maybe then medium security, then it's minimum security, you know, depending on his behavior in the system.

Q. So, that means he'd be housed with non-violent offenders?

A. Yes, sir.

Q. Such as what?

[450] A. Such as parole violators, people with misdemeanors or drunk driving maybe.

Q. Now, you have been a corrections officer for about 18 years?

A. Yes, sir.

Q. And in your experience have you found it to be unusual for prisoners who are all together in the prison system to be able to get drugs and intoxicants into the prison?

A. Yes.

Q. You find that unusual?

A. It's not unusual, no.

Q. So, it happens?

A. I mean it's a known fact it comes in, you know.

Q. How about weapons?

A. Well, it's a known fact weapons are known to come in.

Q. Now, you said also that Mr. Mickens hasn't been a problem for you or hasn't been a problem to your knowledge. He has had infractions; hasn't he?

A. He had one that I know of, but it was an isolated incident.

Q. What was that?



A. I think he was charged with having possession of an intoxicant charge sometime last summer.

Q. What kind of intoxicant would that be?

A. Mash.

[451] Q. Can you explain what Mash is?

A. Penitentiary whiskey.

Q. Now, when you say penitentiary whiskey, that is something the prisoner makes himself?

A. Yes. That is something where they use the fruit from their meals and maybe the juice from breakfast or something and kind of let it set for awhile.

MR. DANIELSON: Thank you, Sergeant Robinson. I don't have any further questions.

## REDIRECT EXAMINATION

BY MR. KEELING:

Q. So, Mash is something, it's a liquid you keep in a container until it starts to ferment; is that correct?

A. Yes, sir.

Q. It's not building a still or anything else like that; is it?

A. No, sir.

Q. And should Mr. Mickens get life in prison without parole would it take longer than 90 days for him to go to minimum security?

A. Minimum? Yes, it will.

Q. How long, or do you know how long, it would take for him to even go to medium security?

A. I was just using 90 days because that is the minimum time that it would take.

[452] Q. In other words, for 90 days he would be under close scrutiny; correct?

A. Yes, sir.

Q. After that they would then begin the classification procedure?

A. Yes, sir.

Q. But after 90 days he would not be placed in minimum security?

A. It's not a guarantee.

Q. With this particular charge?

A. No, sir.

MR. KEELING: Thank you, Officer. I have no questions.

* * * *

CLOSING ARGUMENT

BY MR. GWYNN

[472] Walter Mickens had no infractions except he was able to get a hold of intoxicants, penitentiary whiskey, as Sergeant Robinson put it, but one thing Sergeant Robinson also told you, that I'm sure as you listened to it you felt chilled when you heard this, that if Walter Mickens is given a life sentence within 90 days he might be in a population with non-violent offenders, within 90 days.

Now, Sergeant Robinson said that is not probable, that is not likely, but it's possible. Sergeant Robinson also told you if you give this man life in the penitentiary he'd undoubtedly end up with non-violent offenders, and you have evidence today, live evidence, from this witness stand from Charles Siron what happens when Walter Mickens is in a population with non-violent offenders.

Charles Siron was in jail for possession of a drug control act, a non-violent offense. He was in jail with Walter Mickens for a non-violent offense. If given life, according to Sergeant Robinson, there is a possibility that he might end up again with non-violent offenders. Is that what you want to do?

* * * *

BY MR. SAUNDERS

[479] Rape was a capital offense, not rape where death took place but just plain ordinary rape was a capital offense, and those laws would still be on the books and they'd still be



being executed the way they had been executed except the United States Supreme Court put a stop to it. They said there was certain foundations you have to have, and the Government may have established to your satisfaction those foundations for you to consider imposition of the death penalty, but remember, the other alternative is to put Mr. Mickens away for the rest of his natural life. Think about what he's been convicted of, live what he's been convicted of.

The Commonwealth is going to get up here and say Mr. Hall is not alive. If there was anything I could do to bring him back I would, but I can't. Does that mean you have to authorize the State of Virginia to take Mr. Mickens' life? It's not a matter of protecting society at this point in time because you have the other option of locking him away for the rest of his natural life.

He's not going to get out on parole. That is what that instruction tells you. Life means life without parole, not a possibility of parole. So, what is the Government asking you? Is it to protect society? No. It's pure revenge. They want to make the family of Mr. Hall feel better, and believe me I know how Mr. Hall's family would feel because my son turned [480] 16 on the 11th of this month. I can sympathize with the Hall family totally. I've lost friends in Vietnam. I know what it's like to lose people you love. That is no justification for pure revenge, and that is all this is in this case. Thank you, ladies and gentlemen.

* * * *

On February 8, 1996, the jury returned into Court after having found the following verdict, to-wit: "Walter Mickens Jr. having been found guilty of the capital murder of Timothy Jason Hall occurring in the commission of, or subsequent to, attempted forcible sodomy, we, the jury, having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, AND having unanimously found that his conduct in

committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death. (Signed) Robert Stinson, Jr., Foreperson." Thereafter, the jury was polled, on joint motion of the Commonwealth and the defendant and dismissed.

The Court, on February 8, 1996, pursuant to and in accordance with Code Section 19.2-264.5, before imposing sentence, directed a Probation Officer of this Court to thoroughly investigate upon the history of the defendant and all relevant facts, to the end that the Court may be fully advised as to whether the sentence of death is appropriate and just, the reports to be made, presented and filed as provided in Section 19.2-299. Thereupon, consideration of the report and sentencing was set on the 29th day of March, 1996, at 9:00 a.m., to which time this case was continued.

The record made by the Court Reporter herein of the said proceedings was filed as part of the record in this case. The Court certifies that at all times during the trial of this case the defendant was personally present and his attorneys were likewise personally present and capably represented the defendant.

The said defendant was remanded to jail.

/s/ Verbena M. Askew
VERBENA M. ASKEW
Judge



VIRGINIA: In the Circuit Court for the City of Newport News, Friday, the 29th day of March, 1996.

PRESENT: Verbena M. Askew, Judge.

Indictment #23770-92

| | |
|---|---|
| Commonwealth | :Indictment for Virginia Code 18.2-31[5] (Capital Murder) 08-10-92 Re-Sentencing |
| v | |
| Walter Mickens, Jr. (DOB 10-19-54) | :A Felony-Offense Date 3-28-92 through 03-30-92 |

This day came again the attorney for the Commonwealth, Howard Gwynn, and Walter Mickens, Jr. (hereinafter referred to as defendant), who was convicted of a felony, to-wit: Capital Murder (Virginia Code Section 18.2-31[5]), who was led to the bar in the custody of the jailer of this Court, and also came Bryan L. Saunders and Warren F. Keeling, defendant's attorneys heretofore appointed. Susan Ronan, Court appointed Court reporter, was sworn to faithfully and accurately take down and transcribe the proceedings herein.

Whereas, the defendant was originally tried by a Jury and found GUILTY of Capital Murder (Virginia Code Section 18.2-31[5]), a felony on June 3, 1993. A new Jury was empanelled on the re-sentencing phase and sentenced the defendant to death on February 8, 1996. The Court, on February 8, 1996, pursuant to and in accordance with Code Section 19.2-264.5, before imposing sentence directed a Probation Officer of this Court to thoroughly investigate upon the history of the defendant and all relevant facts, to the end that the Court may be fully advised as to whether the sentence of death is appropriate and just, the reports to be made, presented and filed as provided in Section 19.2-299, and this matter was continued until this date.

The Probation Officer of this Court, to whom this case has been previously referred for investigation, appeared in open court and his post sentence report which was previously presented to the Court was thereupon re-presented in open court in the presence of the defendant who had been fully advised of the contents of the report, a copy of said report having been delivered to counsel for the defendant, as provided by law.

Thereupon, the defendant and his counsel were given the right to examine the Probation Officer as to any matter contained in the said post sentence report and to present any additional facts bearing upon the matter as they desired to present. The report of the Probation Officer is hereby filed as part of the record in this case.

Whereupon the Court taking into consideration all of the evidence in the case, the post sentence report of the Probation Officer, and such additional facts as were presented by the defendant, determined that the evidence clearly establishes that the sentence of death is appropriate and just under the indictment for Capital Murder (Indictment #23770-92), and it being demanded of the said defendant if he desired to make a statement which he did and if anything for himself he had or knew to say why judgment should not now be pronounced against him according to law and nothing being offered or alleged in delay of judgment, it is the judgment of the Court that the defendant, be and he is hereby sentenced to death by electrocution or lethal injection as provided in Section 53.1-234 of the *Code of Virginia*, it being the sentence determined and fixed by the jury in its unanimous verdict.

Accordingly, it is ordered that the defendant be conveyed forthwith to the custody of the Virginia Department of Corrections, in whose custody, on the 30th day of September, 1996, the Director of said Department of Corrections shall cause the defendant to be electrocuted or injected with a lethal substance until dead, in the manner and mode prescribed by the laws of the Commonwealth of Virginia, this



mandate said Director shall faithfully execute unless this order is automatically stayed by filing of record on review of death sentence, or stayed by either executive clemency or by an order of the court of competent jurisdiction.

The Court further advised the defendant, and the defendant's attorneys of the defendant's right of (1) automatic review of the sentence of death by the Supreme Court of Virginia pursuant to Code 17-110.1 and 17-110.2 and (2) to petition for an appeal of this judgment or any other issue he so desired to the Supreme Court of Virginia, and advised the defendant that the first step in any such petition for appeal is filing of notice of appeal with the Clerk of this Court within thirty (30) days.

The Court appoints Bryan L. Saunders and Warren F. Keeling, defendant's trial counsel, to represent the defendant in perfecting, processing and otherwise pursuing to conclusion defendant's automatic appeal of the death sentence and any other relevant issue to the Supreme Court of Virginia.

It is further ordered that the transcript of the entire proceedings in these cases shall be transcribed as expeditiously as practicable and the transcript filed forthwith upon transcription with the Clerk of this Court, and become a part of the record when the transcript is so filed in the Clerk's Office of this Court in accordance with the statutes and rules for such cases made and provided, and, upon receipt of the same by the Clerk, he shall complete the record in accordance with Code Section 17-110.1 and Rule 5:14 and transmit the same to the Supreme Court of Virginia.

And, the record made by the Court Reporter herein of the said proceedings is filed as part of the record in this case. The Court certifies that at all times during the trial of this case the defendant was personally present and his attorneys were also personally present and capably and ably represented the defendant.

The said defendant is remanded to jail to await transfer to the State Penitentiary.

This order is entered and signed by the Court this 29th day of March, 1996, in open court and in the presence of the attorney for the Commonwealth, the defendant, and both of his said counsel.

/s/ Verbena M. Askew
VERBENA M. ASKEW
Judge



IN THE
SUPREME COURT OF VIRGINIA

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WALTER MICKENS, JR.,
Prison Number 212431,
*Petitioner*,

v.

SAMUEL V. PRUETT, WARDEN,
MECKLENBURG CORRECTIONAL CENTER,
and
RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,
*Respondents*.

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PETITION FOR A WRIT OF HABEAS CORPUS

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TO THE HONORABLE CHIEF AND JUSTICES OF THE SAID COURT:

Comes now the Petitioner, Walter Mickens, Jr., by his undersigned appointed counsel, and represents to this Court that he is illegally detained, under sentence of death, in the custody, control, and confinement of the respondents and their agents of the Mecklenburg Correctional Center, Virginia Department of Corrections, and that his confinement is in violation of the Constitution of the United States and the Constitution and the laws of the Commonwealth of Virginia. The petitioner seeks relief pursuant to section 8.01-654, of the Code of VIRGINIA. Section 8.01-654.1 of the Code of Virginia states that the petition for habeas corpus relief must be filed within 60 days of the denial of certiorari by the United States Supreme Court. On June 9, 1997 the United States Supreme Court denied the petitioner's petition for writ of certiorari. The petitioner was tried from May 24, 1993 to

June 7, 1993 with the intervention of a jury, before the Honorable Warren Stephens, in the Circuit Court for the City of Newport News on the charges of attempted forcible sodomy, and capital murder, being murder during or subsequent to the attempted forcible sodomy of Timothy J. Hall. The petitioner was found guilty of both offenses and sentenced to ten years in prison on the charge of the attempted forcible sodomy, and after hearing evidence in the penalty phase of the capital offense, sentenced the petitioner to death. This Court affirmed the petitioner's convictions and death sentence after the initial trial. *Mickens v. Commonwealth*, 247 Va. 395, 442 S.E. 2cd 678 (1994) *Mickens I*. The Supreme Court of the United States vacated the original judgment and remanded the case to this Court for reconsideration in light of *Simmons v. South Carolina* 512 U.S. 154 (1994). *Mickens v. Virginia* 115 S.CT. 307 (1994) This Court then returned the case to the trial Court for resentencing. *Mickens v. Commonwealth* 249 Va. 423, 457 S.E. 2d 9 (1995) (Mickens II).

The petitioner was the subject of a new sentencing hearing based on that order, before the Honorable Verbena Askew, with the intervention of a jury, in the Newport News Circuit Court on February 5-8, 1996. This jury also returned a verdict of death based on both of Virginia's aggravating factors, vileness and future dangerousness. On direct appeal this Court upheld the death sentence of this second jury. *Mickens v. Commonwealth* 252 Va. 315, 478 S.E.2d 302 (1996) *Mickens III*

As mentioned the United States Supreme Court denied the petitioner's petition for certiorari on June 9, 1997. Therefore the petitioner must file this writ within 60 days of that date.

The right to habeas corpus relief is a state as well as a federal Constitutional right. It is a right that even predates the federal Constitution. Article I section 9 of the Constitution of Virginia. The purpose and object of the right to habeas



corpus review is to determine if the petitioner is in custody in violation of the Constitution. This involves a review of the trial record, as well as beyond this record. In order for habeas corpus petitions to allege violations, the facts if true, must be substantiated properly, or fall as mere conclusions. *Fitzgerald v. Bass* 6 Va. App. 38 (1988).

The petitioner now files with this Court a petition for writ of habeas corpus under section 8.01-654 of the Code of Virginia. The petitioner incorporates all jurisdictional facts of this case that have been previously mentioned.

The petitioner's conviction for capital murder resulting from the proceedings in 1993, and sentence of death imposed in the 1996 remand hearing have both been imposed in violation of the Virginia and United States Constitution. The allegation of the illegality of the petitioner's detention under a sentence of death cannot be fully determined based solely on recorded matters. The taking of evidence is necessary for the proper disposition of the petition. The petitioner is not limiting his claims for relief solely based on the record, as petitioner asserst that evidence must be taken to properly resolve this matter. The petitioner reserves the right to amend the petition and requests leave of this court to do so at a later date.

The petitioner asserts the following grounds both individually and cumulatively, for granting the writ. Due to the cumulative nature of the alleged errors and the prejudice flowing therefrom, petitioner states his intent that each paragraph or subparagraph of this petition or any amendment thereto be deemed to incorporate by reference every other paragraph or subparagraph of this petition or any amendment thereto. All the issues raised must be done also, based on violations of the United States Constitution.

Each claim for relief raised below is predicated on Article I sections 8, 9 and 11 of the Virginia Constitution, and the

fourth, fifth, sixth, eighth, and fourteenth Amendments to the United States Constitution, and on other law set forth in the petition. For all the following numbered claims of error, the petitioner was deprived of his right to the effective assistance of counsel at trial, and on appeal, in violation of the Virginia Constitution, and the sixth eighth, and fourteenth amendments to the United States Constitution, and *Strickland v. Washington* 466 U.S. 688 (1984). The petitioner raises claims of error in this petition, and asserts the above authority, even concerning such claims that were raised by counsel previously. Even is prior counsel raised certain issues, and this Court decided the merits of such issues on direct appeal, it does not alter the fact that the petitioner is being held in violation of the Virginia and Federal Constitutions.

All allegations in this petition are incorporated into this claim specific reference.

Ordinarily a claim of ineffective assistance of counsel would not be raised at the trial, so that such a claim would not be cognizable on direct appeal to this Court under Supreme Court rule 5:21. Thus a prisoner could not receive a full and fair opportunity to litigate the issue on appeal, and a state habeas action would lie on the ineffective assistance issue. *Cartera v. Mitchell* 553 F. Supp. 866 (E.D. Va. 1982) Some issues raised herein were not brought up as a violation of the federal Constitution, either at trial or on appeal. Petitioner has the right to raise these, as well as issues that were raised previously, in this petition for habeas corpus. Any issues now brought before this Court are also made pursuant to the Sixth and FOURTEENTH Amendments to the United States Constitution. *Coleman v. Thompson* 501 U.S. 722 (1991) *Green v. United States* 880 F. 2d 1299 (11th Cir.) *Orazio v. Dugger* 876 F. 2d 1508 (11th Cir.) The petitioner, can demonstrate by the record, and by the allegations herein, that but for errors previously made, the results of the proceedings would have been different.



The standard set forth in the two part test established in *Strickland* applies at the sentencing phase of a capital trial as well as the guilt phase, and to the performance of appellate counsel. *Evitts v. Lucey* 469 U.S. 387 (1985). *Fitzgerald v. Bass* 6 Va. App. 38, (1988), *Virginia Dep't of Corrections v. Clark* 227 Va. 525, 318 S.E.2d 399 (1964).

1. The evidence was insufficient to prove beyond a reasonable doubt that the petitioner was guilty of the offense of attempted forcible sodomy in violation of indictment number 23769-92, section 18.2-67.5. This conviction was the result of the proceedings that took place in 1993, and were upheld on direct appeal. The petitioner now alleges that he is being held in custody in violation of the federal constitution, since the evidence is insufficeint to prove he was guilty of that offense. The body of Timothy Hall was found on March 30, 1992, on a mattress covered by a sheet of plywood. The body was nude from the waist down, and his legs were spread about 12 inches apart. Pubic hairs were found on the victim's buttocks and blood stains were noted on the outside of the victim's thighs. Cigarette butts and beer cans found in the area were examined for the forensic value.

There were 143 separate sharp force injuries to the bcdy of Mr. Hall. There were 62 paired injuries, caused by a knife with double blades. There were also 13 separate single stab wounds and three paired. 25 of the 143 stab wounds were fatal. Mr. Hall could have lived as long as 40 minutes after the last wound was inflicted. The petitioner was found several days later riding a bike in the area where the victim's body was located. Upon being questioned initially by the police the petitioner volunteered that the police had not found a knife on him, and the police had not mentioned anything about a kinfe prior to that statement by the petitioner. After being served with the warrants charging the petitioner with the instant offenses the petitioner stated that he accepted the charges, he accepted the warrants. Upon being asked what

that meant, the petitioner with anger exclaimed, if I accept these warrants that means I'm guilty, don't it. In the jail, at a later time, while in a holding cell, there was testimony that the petition admitted to the instant offenses to another inmate. A witness testified that the petitioner sold him the shoes that were worn by the victim, and pubic hairs found on the victim's body were alike in all identifiable microscopic characteristics to that of the petitioner. A DNA sperm analysis matched that of the petitioner, that was found on the mattress where the victim was located. The population frequencies were that one in 6,000 African Americans have the same match characteristics. The petitioner is African American. An analysis of the cigarette butts found on the scene did not exclude the petitioner.

The Commonwealth was required to prove that the petitioner committed the act of attempted forcible sodomy on the victim. Only by speculation can any trier of fact come to such a conclusion. Speculation as to the element of the crime is not sufficient to sustain a conviction. *Rogers v. commonweath* 242 Va. 307, 410 S.E.2d 621 (1991). The Commonwealth's evidence failed to prove beyond a reasonable doubt that the petitioner commited an act of attempted forcible sodomy. There was no evidence that the petitioner was ever with the victim. Any evidence coming from a cell-mate is highly suspect and should be viewed with caution. Whenever the evidence leaves indifferent which of several hypothesis is true, or merely establishes only some finite probability in favor of one hypothesis, this is not proff beyond a reasonable doubt. *Maynard v. Commonwealth* 10 Va. App. 15, 389 S.E.2d 910 (1990). *Jackson v. Virginia* 443 U.S. 307 (1979) holds that as a matter of due process the evidence must be sufficient beyond a reasonable doubt, and the evidence is far short of that standard in relation to the charge of attempted forcible sodomy.



2. The evidence is also insufficient to convict the petitioner of the capital murder offense, the willfull deliberate, and premeditated killing in the act of attempted forcible sodomy. *Jackson v. Virginia* 443 U.S. 307 (1979), also dictates that as a matter of due process under the fourteenth amendment, the conviction for this offense must also be vacated. There was no evidence that the petitioner did any act toward the commission of forcible sodomy or murder of the victim. The testimony from the witnesses concerning the shoes, and the cell-mate are highly suspect, and not worthy of belief. Even the DNA evidence is circumstantial, and in no way excludes the possibility that someone else was the real offender, or that the sample was that of the petitioner's to the exclusion of all individuals.

The DNA testimony is only an indication of what the statistics demonstrate and not a definitive showing that only the petitioner left the sample. Someone else clearly could have committed the acts against the victim, and only by speculation can it be said that the petitioner is the individual who did so. Speculation alone is not enough for a conviction. *Rogers v. Commonwealth* 242 Va. 307, 410 S.E.2d 621 (1991).

3. There was error in the initial instructions to the juror in the first trial in 1993, during the guilt phase of those proceedings. The jury was instructed that if they found the petitioner guilty of attempted forcible sodomy, they were to find him guilty of capital murder, since without the conviction of attempted forcible sodomy, there could be no capital murder offense. The jury was instructed on first degree, but it was an all or nothing situation that they were presented with.

They were not instructed that even if they found the petitioner guilty of attempted forcible sodomy, they could find him guilty of first degree murder, and not capital murder. The jury should have had the option that even if they found

him guilty of forcible sodomy, they did not have to find him guilty also of capital murder. There is no requirment that even if the underlying offense is found beyond a reasonable doubt, that the capital murder conviction must follow.

On a sentence of death for instance, even if the jury finds beyond a reasonable doubt the existence of both aggravating circumstances, they do not have to return a verdict of death, they are still free to return a verdict of life imprisonment. There should be no distinction in the matter concerning the instructions in the guilt phase. Whatever the jury determines on the existence of aggravating circumstances, they are always free to find life. *Smith v. Commonwealth* 248 S.E.2d 135 (1979). Pages 929 to 935 of the proceedings of the first trial enclosed herein, demonstrate the error in those instructions. The jury should have been instructed that it was permissible to return a verdict of first degree murder only, even if the existence of attempted forcible sodomy was found, and not exclusively capital murder. The jury was only informed that they must return a verdict of capital murder only, if forcible sodomy was demonstrated. There was onjection to this at the trial, and the instructions as given violated the fourteenth amendment to the U.S. Constitution, and the petitioner was also denied the rights pursuant to the sixth amendment to the U.S. Constitution therein.

4. While the issue of instructions to the jury was made and raised on appeal in the first case, the jury was not properly instructed during the penalty phase of the remand proceedings in 1996. On February 5-8, 1996 a second penalty phase in the capital murder trial was held in the instant matter based on a remand from the Virginia SUPREME COURT. The petitioner was denied the effective assistance of counsel under the sixth amendment to the U.S. Constitution at those proceedings in relation to the instructions given the jury, and on direct appeal. The instructions also violated the fourteenth amendment to the United States Constitution. Proper instruction to



the jury on the use of mitgation was not raised at the remand sentencing hearing, and was not considered on direct appeal. The instructions provided the jury were completely inconsistent with the state of law on the use of mitgation evidence. The only mention of mitgation evidence in the instructions were that the jury could find either verdict of life or death, "after considering mitigation" evidence. The use of this phrase does not save the instructions. There was no offer of a constitutionally correct instruction. The instruction read to the jury implied that upon a finding of aggravating circumstances, that is all that is needed to impose a sentence of death, and gives improper consideration to mitigation evidence. The instructions violate the holdings of *Mills v. Maryland* 486 U.S. 367 (1988), and *McKoy v. North Carolina* 494 U.S. 433 (1990). Under those cases the jury must be told in accordance with the VIII and XIV amendments to the U.S. Constitution, that the jury can find a sentence of life, even if it finds an aggrvating factor beyond a reasonable doubt, and that it must not refuse to consider a mitigating factor. *Locket v. Ohio* 438 U.S. 586 (1978). Further it is a violation of the federal constitution not to tell the jury that they do not have to find mitigation beyond a reasonable doubt to render a sentence of less than death.

The instructions given, and not obejcted to, failed to provide the jury with correct guidance on the proper state of how they should view the evidence before deciding on a proper punishment. There was no offer of an instruction, and thus none provided that told the jury a life sentence was allowed even if the aggravating circumstances were found beyond a reasonable doubt, and that also the evidence in mitigation did not have to be found beyond a reasonable doubt to hand down a sentence less than death.

The instructions violated *Mills v. Marvland* and *Locket v. Ohio*, and as such are in violation of the federal constitution. The jury in the petitioner's case should have been instructed

that he was free of any burden to prove mitigating circumstances or that mitigating circumstances must be equal to or greater than aggravating circumstances. Only by telling the jury that they may still sentence the petitioner to life even if the aggravating factors are found beyond a reasonable doubt, would uphold the contitutional doctrines of a fair trial and due process. Further, the jury should have been instructed to consider mitigating factors beyond the statutory mitigating factors that are listed in the verdict forms. No mitigating factor may be kept from the jury, whether listed by statue or not, and no mitigating factor may be withheld from consideration in the instructions. In *Carzell v. Kemo* the death sentence was set aside because instructions failed to inform the jury that it could sentence the petitioner to life imprisonment even if it found aggravating circumstances. *Carzell v. Kemp* 809 F.2d 702 (11th Cir. 1987). *Williams v. Dixon* 961 F.2d 448 (4th Cir. 1992), held that it was unconstitutional to inform the jury that they had to find mitigating circumstances beyond a reasonable doubt. Only by informing the jury in this case that they did not have to find a mitigating factor beyond a reasonable doubt, to vote for a sentence of life, would his constitutional rights to due process be upheld. Also *Adams v. Aiken* 965 F.2d 1306 (4th Cir. 1992), held relying on *Locket v. Ohio* 438 U.S. 586 (1978), that a jury can not be precluded from considering any mitigating factor, any aspect of the petitioner's background, when determining what the appropriate punishment is. These instructions were not requested, and not given, and as such the petitioner's sentencing hearing of February 5-8, 1996 violated the sixth, 8th, and 14th amendments to the U.S. Constitution.

5. While a challenge to the Virginia Death Penalty Statue was raised in the instant case, the petitioner does further incorporate into this petition a Constitutional challenge to the Virginia death penalty statute. There is a lack of direction for the jury's discretion regarding 'vileness' and future danger-



ousness.' Both factors are vague, and both factors are constitutionally invalid. The petitioner was sentenced to death as a result of the remand proceedings on February 5-8, 1996, based on a finding of both statutory factors, vileness and future dangerousness. The Virginia death penalty statute as applied in petitioner's case failed to provide meaningful guidance to the jury. Neither of Virginia's two aggravating factors provide meaningful instruction to the sentencer to avoid the arbitrary and capricious infliction of a death sentence. Accordingly each aggravating factor must be declared unconstitutional, and consequently neither may be relied upon by this jury that sentenced the petitioner to death. U.S. Const., amendments VI, VIII, XIV, Art. I sections 8, 9, and 11 Va. Consti. This issue is controlled by *Godfrey v. Georgia* 446 U.S. 420 (1980), and the cases that follow *Godfrey*. In *Godfrey* the Supreme Court ruled unconstitutional Georgia's aggravating factor that is identical to the 'vileness' factor in Virginia. In *Godfrey* the jury was allowed to sentence the defendant to death if the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery. Further in *Maynard v. Cartwright* 486 U.S. 356 (1988) the Supreme Court invalidated Oklahoma's death penalty statute, which provided that a sentence of death may be imposed if the offense is especially heinous atrocious, or cruel. In *Tuilaepa v. California* 114 S. CT. 2630 (1994), the Supreme Court further clarified the necessity of clear and unambiguous direction to sentencing juries. Accordingly, as a matter of federal constitutional law, the vileness provision of the code of Virginia is unconstitutional. An unconstitutionally vague statute may be saved if a state limits its construction to provide meaningful guidance to the sentncer. Limiting instructions themselves may be unconstitutionally vague. *Shell v. Mississippi* 111 S. CT. 313 (1990). Since Virginia relies upon the unadorned statutory language to define the aggravating factor of vileness, and did so in this case, that

aggravating factor is unconstitutional as applied in Virginia, and in this case. *Walton v. Arizona* 111 S. CT. 313 (1990). With respect to the individual definitions of cruel, heinous and atrocious, *Shell* empahsized that only one definition need be constitutionally infirm to require a death sentence to be set aside. Further, the definition of depravity of mond, announced by the Virginia Supreme Court bears no resemblance to the definition of depraved murder validated in *Walton v. ARIZONA* 110 S. CT. 3057 (1990). Virginia's death penalty statutes provide for two aggravating factors, both of which the state must prove beyond a reasonable doubt, and either of which the jury may rely on to impose the death penalty. Va. Code 19.2-264.2-264.4(c). In *GODFREY* the trial Court merely quoted the statutory language to the jury, the language that is similiar to the Virginia Code, and provided no further instruction. The United STATES Supreme Court held: there is nothing in these few words standing alone, that implies any inherant restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as outrageously or wantonly vile, horrible and inhuman. *GODFREY V. Georgia* at 428-29. Finding the unadorned statutory language vague, the Supreme Court rejected as unconstitutional the standardless and unchanneled imposition of the death sentence in *Godfrey* which was made by a basically uninstructed jury, and resulted from the jury's uncontrolled discretion. The jury's interpretation of the vileness factor in *Godfrey*, the Court stated can only be the subject of sheer speculation, at 428-29. In *Walton v. Arizona* 497 U.S. 639 (1990), the Supreme Court again stated, When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. In *Clark v. Commonwealth* 220 Va. 201, this Court ruled that each element of the vilness factor has an



accpeted meaning. However Virginia'a vileness factor is identical to that found unconstitutional in *Godfrey*. Further, the definitions fro depravity of mind as supplied by *Smith v. Commonwealth* 219 Va. 455 (1978), are no more informative than the unconstitutionally vague terms of outrageously or wantonly vile, especially heinous, atrocious or cruel, or extremely wicked or shockingly evil, found lacking in *GODFREY*. Accordingly any limiting instruction using them is unconstitutionally vague. Virginia's vileness factor is unconstitutionally vague according to *Godfrey v. Georgia*, and the instructions provided the jury in petitioner's case regarding the vileness factor used the identical language that was ruled violative of the federal constitution in *Godfrey*. Therefore petitioner's sentence of death is based on unconstitutional aggravating factors, and as such petitioner is entitled to have his sentence of death vacated.

Also, Virginia Code section 19.2-264.4(c), provides that a person shall not be sentenced to death unless the Commonwealth proves beyond a reasonable doubt that there is a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. This future dangerous factor is unconstitutionally vague as applied in Virginia, and in this case. *Furman v. Georgia* 408 U.S. 238 (1972) *Gregg v. Georgia* 428 U.S. 153 (1976). The instruction that was provided the jury in this case merely recited the aggravating factors according to the unconstitutional language of the Virginia Code. It provided no narrow construction, and did nothing to insure that the petitioner is among that narrow class of people that are sentenced to death. *GODFREY*. The Virginia statutory scheme under which the petitioner was sentenced to death is unconstitutionally vague and overbroad on its face and as applied in this case. Although numerous courts have recognized the vague character of the language Virginia uses in its vileness aggravating circumstance, Virginia Courts do not provide clear and objective standards by which jurors could be

guided. The failings deprive jurors of a meaningful understanding of the aggravating circumstances upon which a death sentence can be based as well as the impact of these circumstances when considered alongside other sentencing factors, including evidence in mitigation. Aggravating factors must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a death sentence. *Godfrey v. Georgia* 446 U.S. 420 (1980). Also an aggravating factor must narrow the class of persons eligible for the death penalty and must justify the imposition of a more severe sentence on the defendant, compared to others found guilty of murder. *Tuilaepa v. California* 114 S. Ct. 2630 (1994) THE Virginia scheme can not survive this two part test of *Tuilaepa*. This Court has held that contrary to the U.S. Supreme Court's line of cases requiring that aggravating factors be sufficiently defined and limited to properly guide the jury, capital sentencing juries need not receive any definitional instructions of the terms depravity of mind, torture and aggravated battery. The trial Court in petitioner's case provided no limiting definitions of the terms, torture, or depravity of mind, and provided a constitutionally insufficient definition of the term aggravated battery. Thus the jury was merely instructed in accordance with the statutory language Since the jury was not given any limiting definitions of the components of vileness, it cannot be said the jurors did not impose the sentence of death on the basis of a vague and inadequately defined aggravating factor. Such a result violates the federal constitutional requirement that the jury's discretion be properly guided and that the verdict be rationally reviewable.

Also an aggravating factor must narrow the class of death-eligible defendant's. "If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Arave v. Creech* 113 S. CT. 1534



(1993). Indeed, Virginia continues to permit juries to sentence defendant's to death based on an aggravating factor it concedes may include all intentional killings. *Smith v. Commonwealth* 248 S.E.2d 149. Appellate review which does not impose a limiting construction is insufficient to save the statute. *Newlon v. ARmontrout* 885 F. 2d 1328 (8th Cir., 1989). The U.S. Supreme court has stated that appellate review must do more than simply apply a limiting construction to the provision and determine whether the evidence could support a vileness finding the Courts need inquire into whether beyond a reasonable doubt the result would have been the same had the vilness circumstance been properly defined. *Clemons v. Missisippi* 494 U.S. 738 (1990) On direct appeal the Virginia Supreme Court did not articulate a clear and objective standard against which it tested its own determination of the sufficieny of the jury's findings.

6. The petitioner should have been afforded a DNA expert at trial, and should have had numerous items of physical evidence tested prior to trial. This claim of error has also been raised in the petitioner's motion for an expert to assist in the investigation previously filed with this Court. At the original trial in the guilt or innocence ohase in 1993, at p.821, the expert for the Commonwealth testified that there were matches in two of four autorads that they tested from the sample found on the mattress, and with bolld from the petitioner. The testimony was that these two matches indicated one in 6,000 african American males could be the source of these matches. This is far from definitive proof that the petitioner is the source of the matches, and indicates someone else could have left the sample. The petitioner should have been afforded a DNA expert to challenge this testimony and he was not. This lack of an expert denied the petitioner the right to effective assistance of counsel, and the right to confront his accusers under the sixth Amendment, and the right to due process and a fair trial under the fourteenth amendment. Without this ability to challenge the

DNA evidence presented against him at trial, the jury was left with only one impression. certainly the petitioner has the right to present evidence that someone else committed the offenses. In addition in reference to the certificate of analysis dated May 26, 1992, enclosed herein, there were numerous items mentioned in that report that were collected and preserved by the police many of these items were never tested at the time of the trial. The items should have been tested to determine if someone other than the petitioner could have been the source of any of them, and if someone else may have been involved. In the absence of doing so, the jury was never provided the opportunity to determine of any other person could have been involved. The petitioner was denied the right to a fair trial under the sixth and fourteenth amendments, due to this lack of a DNA expert, and the lack of testing of all the items of physical evidence that was tested by the police. Only by a thorough and complete examination of all the evidence collected by the police can it be said that no one else could be the criminal agent.

7. There was not an investigator for the petitioner at trial, nor was one requested by counsel. The lack of a proper criminal investigator prevented the petitioner from developing and investigating any issues or facts that may have pointed to the fact someone else may have been involved. This denial of an experienced expert investigator denied the petitioner the right to a fair trial, and the right to present evidence in his own behalf. This was a violation of the sixth and fourteenth amendments to the Constitution.

8. There was no evaluation pursuant to 19.2-264.3:1 to assist the petitioner in the penalty phase of the trial. There should have been one, and particulary in light of the prison mental evaluation dated as far back as 1985, enclosed, indicating the petitioner may suffer from organic brain damage, due to massive glue sniffing. If in fact the petitioner does suffer from such a disorder this information should have



been brought to the attention of the jury, to present a defense that the petitioner did not deserve a death sentence, and that life imprisonment is the more appropriate punishment. This lack of psychiatric evaluation pursuant to statute deprived the petitioner of due process. The Commonwealth argued and the jury found both aggravating factors in this case, and the petitioner did not have the benefit of an independent evaluator or any such assistance to counter the argument that he should have been put to death. The petitioner was deprived of the opportunity to present competant mitigation evidence before the jury, and therefore argue that he should not have been put to death. The lack of any psychiatric evaluation in this case prevented the petitioner from developing his own evidence to rebut the Commonwealth's evidence and argument that he should be put to death, in violation of the U.S. Constitution.

Further, the petitioner should have had an MRI scan conducted by the proper expert, as well as a complete neuropsychologic test battery to fully explore any organidc brain disorder mentioned by the prison mental health report of 1985. Eight years later in 1993, the conditions were probably far worse, and the petitioner should have been evaluated accordingly. Any results of these examinations should have been presented to the jury, and the denail or lack of this has denied the petitioner the right to a fair trial in violation of the U.S. Constitution.

9. The petitioner was denied the rights under the 6th and 14th amendments to the U.S. Constitution, by the seating of Juror Frank Johnson, of the proceedings of February 5-8, 1996. Mr. Johnson's sister had been excused for cause immediately prior to him, due to the fact that her brother had been murdered. Any doubts as to the impartiality of keeping this juror on the panel should have been resolved in favor of the petitioner. Mr. Johnson's brother had been murdered, and even under a situation that is similiar to the facts of the insant

case, and to insure the right to a fair trial of the petitioner, he should have been excused for cause.

10. In the second trial, which determined punishment in this case, potential juror Mary Moore was excused for cause, by agreement of counsel, in violation of the federal constitution. The examination of Ms. Moore ran from pages 129 to page 143 of the transcript of the February 5, 1996 proceedings. Both counsel appeared to dislike the answers she gave, and this juror should not have been excluded for cause. The individual gave answers that indicated a problem with imposing the death penalty and for that reason would have been a favorable juror for the petitioner. Counsel should have forced the Commonwealth if it saw fit to use a strike to remove the juror. Any juror that is ambivalent about imposing the death penalty is someone that should remain on the panel, especially since the only purpose for the remand hearing was to determine ounishment. The petitioner was entitled to an impartial jury, and the exclusion of even one juror in error, is a constitutional violation that is not harmless. *Gray v. Mississippi* 481 U.S. 648 (1987). The erroneous exclusion of a juror because of attitudes regarding the death panalty is not subject to harmless error analysis even when the prosecutor has unexercised peremptory challenges at the end of jury selection, nor can the improper exclusion serve as a remedy for the erroneous denial of the prosecutions challenge of another juror. *Witherspoon v. Illinios* 391 U.S. 510 (1968), the removal of jurors merely because of general scruples against capital punishment denies due process.

11. During the course of the guilt phase of the petitioner's trial in 1993, during the closing argument by the Commonwealth, an improper comment was made on the burden of proof. Certainly, the Commonwealth bears the entire burden of proof in any criminal case, regardless of whether the defendant presents any evidence of not. on page 964 of the record, the Commonwealth did state that the defense has no



burden to prove anything. However the Commonwealth went on to state that "this defendant choose to present evidence to you." This implies that the defendant has not met a burden, that is to in effect prove his innocence. There was no objection to this comment at the trial, and it impermissibly shifted the burden of proof to the petitioner, and as such the jury should never be told this.

12. Further, along in the same argument, the Commonwealth stated, that the petitioner, "wants you to believe, ladies and gentleman, that all of these people have conspired against him, people who were brought together only by the circumstances for the most part of this trial who did not know each other prior to this case.." pages 966-967. While the petitioner did challenge the evidence brought against him, he never specifically stated that it was a conspiracy per se that was behind the Commonwealth's witnesses. There was no objection to this comment at the trial, and it incorrectly reflected what the evidence was.

13. The petitioner was deprived of his right to a fair trial under the U.S. Constitution by the admission of the extensive and prejudicial photgraphs of the victim. Although such matters are left to the discretion of the trial Court, in both the trial of the guilt phase and the resentencing that took place the admission of the photographs so prejudiced the jury that any result in their verdict was the direct reflection of passion and not reason. The admission of the photographs in both instances were so prejudicial that the Court abused it's discretion in admitting them and denied the petitioner the right to a fair trial.

14. The petitioner was deprived of the right to a fair trial since there was no investigator trained in criminal matters to assist in the defense. No motion was made at the time of the trial for the appointment of an investigator to assist the defense. There is no distinction between the right to an expert in the guilt phase of the trial, or the sentencing phase. The

standard a trial Court must look at in determining whether the defendant is entitled to the appointment of an investigator is whether the defendant cam make a particular showing of the need for the assistance of such expert. The issue relevant for such a motion is whether the defendant can demonstrate that the investigator is needed for the defense of the charges, and that there would be a fundamentally unfair trial without such assistance. *Ake v. Oklahoma* 470 U.S. 68, 105 S. Ct. 1087 (1985). *Caldwell v. Mississippi* 472 U.S. 320, 86 L. ED 2d 231, 105 S. ct. 2633 (1985). *Husske v. Commonwealth* 4 S.E.2d 920 (Va. 1996). The Constitution requires the appointment and payment for experts for the basic tool of an adequate defense. *Ake v. Oklahoma* 470 U.S. 68. Compensation for experts is required in order to satisfy the sixth amendments entitlement to the effective assistance of counsel. Without an investigator trained in criminal matters, there will invariably be ineffective preparation of the defense, and thus counsel, no matter how experienced and competent, will be ineffective and not able to present issues to properly represent the defendant. *Mason v. Arizona* 504 F. 2d 1345 (9th Cir. 1974).

In this case a trained investigator could have properly looked into whether there was anyone in the victim's life who could have been responsible for the offense, other than the petitioner. Counsel at trial, or even present counsel, are not trained investigators, and handled properly by the right expert, an investigation could have been made into the community that may have led to someone else as the individual responsible for the instant offenses. Without an investigator the petitioner had no ability to develop any information that may have led to someone else as the criminal agent in this case.

## Conclusion

Wherefore the petitioner Walter Mickens, Jr., moves this Court to grant him relief as follows:



1. Command the respondents to bring him before this Court at a time and place specified and take such action on the petition for writ of habeas corpus as this Court deems appropriate.

2. Grant petitioner a hearing on this petition and accord him the right to present witnesses and testimony as well as argument of counsel.

3. Set aside the petitioner's conviction of capital murder and bar any further prosecution as a violation of double jeopardy, or alternatively, grant the petitioner a new trial.

4. Grant the petitioner a new sentencing hearing in the event the conviction is allowed to stand.

5. Grant leave to amend this writ.

6. Grant any such relief to which he is entitled.

Respectfully submitted,

/s/ George B. Pavek III
GEORGE B. PAVEK III
Counsel for the petitioner
P.O. Box 2725
Newport News, VA. 23609
(757) 872-7809

STATE OF VIRGINIA
COUNTY OF MECKLENBURG

AFFIDAVIT IN FORMA PAUPERIS

I, WALTER MICKENS, JR., being first duly sworn, do say,

1. I am unable to pay the costs of this action or give security thereof:

2. my assets amount to a total of $56.00

/s/ Walter Mickens, Jr.
WALTER MICKENS, JR

Subsribed and sworn to before me this 5th day of August, 1997

/s/ Judy V. Bigger
JUDY V. BIGGER
Notary Public
February 28, 1999

My Commission expires

* * * *

STATE OF VIRGINIA
COUNTY OF MECKLENBURG
AFFIDAVIT OF WALTER MICKENS, JR.

I, WALTER MICKENS, JR., being first duly sworn, do say:

1. I have read, and have had read to me, the foregoing petition for writ of habeas corpus, and attached motions, and papers,

2. and the facts stated in the petition are true to the best of my information and belief.

/s/ Walter Mickens, Jr.
WALTER MICKENS, JR Petitioner



Subscribed and sworn to before me this 5th day of August, 1997

Judy V. Bigger
JUDY V. BIGGER
Notary Public

My Commission expires February 28, 1999

* * * *

Counsel for petitioner has been appointed

G.P.

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Monday *the* 15th *day of* December, 1997.

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Record No. 971669

---

WALTER MICKENS, JR.,
No. 212431,

*Petitioner*,

against

WARDEN of the MECKLENBURG CORRECTIONAL CENTER, *et al.*,

*Respondents*.

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Upon a Petition for a Writ of Habeas Corpus

Applying the rule in *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), to petitioner's allegations 3, 6, 7, 8, 10, 11, 12 and 14; the rule in *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), to petitioner's allegations 1, 2, 4, 5, 9 and 13; and finding no merit in petitioner's allegations of ineffective assistance of counsel, the Court is of opinion that the writ of habeas corpus should not issue as prayed for. It is therefore ordered that the said petition be dismissed.

A Copy,
Teste:
David B. Beach, Clerk
By /s/ Illegible
Deputy Clerk

* * * *

6/3/98 17 ORDER that it is ORDERED that the Clerk shall issue a subpoena duces tecum to the Juvenile and Domestic Relations Court for the City of



Newport News, Virginia requiring production of all juvenile and domestic relations court files involving Timothy Hall. The documents shall be delivered under seal to the Clerk of this Court for examination in camera by the Court before any further release or review of those files is permitted by counsel in this case and then only upon such terms as are provided by further order of the Court. The subpoena shall be issued to Patty A. Ewell, Clerk of the Newport News Juvenile and Domestic Relations Court, 230 25th Street, Newport News, Virginia 23607-4498 ( signed by Judge Robert E. Payne ) Copies Mailed: yes and to U.S. Marshal (sbar)

* * * *

[Filed Jun 3, 1998]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

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Civil Action No. 3:98cv102

---

WALTER MICKENS, JR.,
*Petitioner,*

v.

SAMUEL V. PRUETT, WARDEN,
*Respondent.*

ORDER

Having considered the motion of petitioner, Walter Mickens, Jr., pursuant to Rule 6(a) of the Rules Governing § 2254 Cases in the United States District Courts and for good cause shown, it is hereby ORDERED that the Clerk shall issue a subpoena duces tecum to the Juvenile and Domestic Relations Court for the City of Newport News, Virginia requiring production of all juvenile and domestic relations court files involving Timothy Hall. The documents shall be delivered under seal to the Clerk of this Court for examination *in camera* by the Court before any further release or review of those files is permitted by counsel in this case and then only upon such terms as are provided by further order of the Court.

The subpoena shall be issued to Patty A. Ewell, Clerk of the Newport News Juvenile and Domestic Relations Court, 230 25th Street, Newport News, Virginia 23607-4498.

The Marshal shall serve the subpoena and a copy of this Order with it.



The Clerk is directed to send a copy of this Order to counsel for both parties.

It is so ORDERED.

/s/ Robert E. Payne
ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

Richmond, Virginia
Date: June 3, 1998

* * * *

[Filed Jun 17, 1998]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

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Civil Action No. 3:98cv102

---

WALTER MICKENS, JR.,
*Petitioner,*

v.

FRED W. GREENE, WARDEN,
*Respondent.*

ORDER

This matter is before the Court for review of the documents obtained from the Clerk of the Newport News Juvenile Domestic Relations Court. Upon review of the documents, the Clerk is directed to send a copy of File Nos. J-40845-2, 3 to counsel of record and publish the same in the Court's file. The Clerk is directed to maintain under seal the remaining documents furnished by the Newport News Juvenile Domestic Relations Court.

Mickens has moved for the appointment expert investigative and psychological assistance pursuant to 21 U.S.C. § 848q(4) and (9). Finding that specialized investigative services are reasonably necessary for the representation of Mickens in conjunction with his claim that his trial counsel was laboring under an actual conflict of interest, and that the proposed fees for the services to be provided are reasonable and in conformance with those usually authorized in this area for such services, Mickens' motion for expert investigative assistance is granted. Mickens has not made a similar showing in support of his requests for



investigative services to pursue a claim of actual innocence or for the appointment of a neuropsychologist, and his requests for such services are denied. The Court hereby approves and authorizes the services of an investigator, at a rate of $35.00 per hour for a total of 30 hours, for the purpose of investigating Mickens' claim that trial counsel had an actual conflict of interest which adversely affected his performance.

Any request for further authorization shall be accompanied by a sufficiently detailed explanation of work which has been performed and of work to be performed such that the Court may determine the reasonableness of the request for additional authorization, without waiving any attorney-client privilege or the protection of the work product doctrine.

The Clerk is directed to send a copy of this Order to counsel of record.

It is so ORDERED.

/s/ Robert E. Payne
ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

* * * *

Richmond, Virginia

Date: June 17, 1998

* * * *

DIRECT EXAMINATION—MICHAEL JACOBS
BEFORE JUDGE AUNDRIA FOSTER

[74] Q Do you know how many weeks you had been wearing these shoes, Mr. Jabobs?

A I wore them I'd say about fifteen days.

Q I understand that, but do you know how many weeks?

A About a week and four days, because I think I went over town Friday or Thursday.

Q Do you remember what day of the week you got them?

A Monday or Tuesday.

Q April 7th was on a Tuesday, the day you took this photograph at the Police Department was a Tuesday April 7th. What day of the weak did you get the shoes from Mr. Mickens, if you know?

A Sometime the beginning of that week.

Q Which week?

A The week when I bought them.

Q The week that you bought the shoes was

[75] A. JACOBS—REDIRECT

that the same week that you were taken to the Police Department?

A No, the next week after—not that week but the following week.

Q It couldn't have been the following week.

A I wore them the whole week.

Q The date you took this photograph this one here Commonwealth's Exhibit Number 5 was Tuesday April 7th, okay. Did you buy the tennis shoes from Mr. Mickens that week?

A I don't think so.

Q Was it the week before?

A I got them the week before. And they come and picked me up, I was walking down the street, right, they jumped out snatch me and took me in the van and said Detective Seals wanted to talk to me. I said, I can't believe this.

* * * *



[Received Nov 18, 1996]

VIRGINIA: In the Circuit Court for the City of Newport News, Thursday, the 7th day of November, 1996

PRESENT: Verbena M. Askew, Judge.

| | |
|---|---|
| Commonwealth | :Indictment #23770-92,<br>(Virginia Code Section 18.2-31<br>(5) Capital Murder |
| | v. |
| Walter Mickens, Jr. | Judgment Date: 3-29-96 |

The Court orders that, pursuant to Virginia Code Section 19.2-163.7, George B. Pavek, III be appointed to represent, the said Walter Mickens, Jr. in any Habeas Corpus proceeding that may be held in the Virginia Supreme Court. The clerk is directed to forward copies of this order to Walter Mickens, Jr. #212431, Mecklenburg Correctional Center, P.0. Box 500, Boydton, Virginia 23917, Richard B. Smith, Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219, David B. Beach, Clerk, Virginia Supreme Court and George B. Pavek, III.

/s/ Verbena M. Askew
VERBENA M. ASKEW
Judge

* * * *

AFFIDAVIT

Bryan L. Saunders, first being duly sworn, states as follows:

I am an attorney at law, licensed to practice in the Commonwealth of Virginia, and have been for all times mentioned in this affidavit.

1. I have reviewed the petition for a writ of habeas corpus filed in this action and make the following statements based

on my personal knowledge and a review of portions of the transcript. I have delivered my file concerning my representation of Walter Mickens to his current counsel.

2. I have been practicing law since 1973. Approximately 95% of my practice is defending criminal cases. Prior to representing Walter Mickens in this case I handled one other capital murder case which was tried as a first degree murder case. I can recall at least twelve prior murder cases that I have tried, and I have had dozens of jury trials in serious felony cases over the course of my practice.

3. I was appointed to represent Walter Mickens, Jr., for the capital murder, attempted forcible sodomy of Timothy Jason Hall. I was lead counsel on the case, and was assisted by Warren Keeling. I also was appointed to represent Walter Mickens for a number of other felonies. One of the crimes was another capital murder also involving robbery, abduction and attempted forcible sodomy, and a victim who was stabbed dozens of times. After the conviction and death sentence in this case, the other capital murder and related charges were nolle possed. Walter Mickens was also charged with two abductions, robbery, and indecent liberties with a minor. Those charges all were dismissed at preliminary hearing in the juvenile court.

4. I was aware before trial that the Commonwealth intended to make use of DNA evidence in this case. The Commonwealth's Attorney maintained an open file policy in this case and I reviewed the information collected. I conducted research on the use of DNA evidence and I spoke with the Commonwealth's experts before trial. I also had the opportunity to preview the experts' testimony at the preliminary hearing. I was aware that the Commonwealth's experts' testimony would describe only general "matches" between my client and the victim. Dr. Blake testified that both the defendant and the victim shared the same "DQ Alpha" genotype, and that either could have contributed the



sample found in hairs and on a cigarette butt. I brought out from Dr. Blake that the particular genotype also was the most prevalent genotype in both the black and white populations. Dr. Vanty's testimony of the RLFP testing also would not produce a clear match of the type that is offered in some cases. She admitted that she matched only two probes, and two others were "inconclusive." She could not eliminate my client as the donor of sperm stains, but the projected probabilities were that 1 in 6000 black persons and 1 in 27,000 whites could have the same DNA match.

5. Based on my knowledge of the DNA evidence in this case as well as my research on DNA evidence generally, I had no reason to ask for a DNA investigator for the defense. I do not consider the rather general and broad "matches" described by these witnesses as a factor that could be disputed in any significant way, nor do I think that it was likely to be considered as decisive by the jury.

6. I had no reason to ask for an investigator in this case. My client suggested witnesses that I should talk to and I spoke with them. I was not able to develop any useful evidence from these witnesses. I was fully aware of the Commonwealth's case from reviewing the file. Walter Mickens had been in prison for most of his adult life. I obtained the records concerning my client from the Department of Corrections and reviewed them to gain additional information about my client.

7. Prior to the preliminary hearing, I asked the Court to have my client evaluated for competence to stand trial and sanity at the time of these crimes. Dr. Killian was appointed and conducted the evaluations. I have known Dr. Killian for some time and respect his judgment. There was nothing helpful from these evaluations.

8. I am familiar with the notation in my client's prison file that refers to the possibility of organic brain injury as a result

of Walter Mickens sniffing inhalants. I reviewed the complete file and found nothing to support this single statement made years ago. I took this information to Dr. Killian and asked him if there was anything in his examinations that would confirm this. Dr. Killian did not have any reason to suspect any significant problem of brain damage, but offered testing for my client. Arrangements were made for transporting Walter Mickens for testing, but he refused to take the test.

9. I have reviewed the transcript of the voir dire of juror Mary Moore. I recall that this juror was all over the place in her responses concerning her ability to impose a life or death sentence. I had no confidence that this juror would be favorable to the defense, based on her confusing answers. The prosecutor also was wary of the juror for the same reasons. I had no difficulty in joining in a motion to exclude her from this jury.

10. I have also reviewed the transcript of the prosecutor's closing argument in the guilt phase of trial. As a matter of my own practice, I see nothing to be gained by unnecessary objections to fair argument. I did not object to the prosecutor's argument as alleged because I do not think it exceeded the bounds of fair argument.

/s/ Bryan L. Saunders
BRYAN L. SAUNDERS

Sworn and subscribed to before me, a notary public, in and for the City of Newport News, this 5th day of September, 1997.

/s/ Illegible
Notary Public

My Commission expires: 6/30/00

* * * *



## AFFIDAVIT OF WAYNE KENNEDY, INVESTIGATOR COMMONWEALTH OF VIRGINIA

THIS DAY personally appeared before me, a Notary Public for the Commonwealth of Virginia, WAYNE KENNEDY, who, being duly sworn, make oath as follows:

1. My name is Wayne Kennedy, I am over eighteen years of age, and I have personal knowledge of the facts contained in this affidavit.

2. I am an investigator, licensed in the Commonwealth of Virginia, and I have been hired by counsel for Mr. Mickens to investigate the conflict of interest claim regarding Mr. Saunders' representation of Mr. Hall and Mr. Mickens.

3. On July 1, 1998, I spoke with Mr. Charles Kirby, an employee of the Corner News, and Grocery, 2800 West Avenue, Newport News, Virginia, who informed me that he knew Timothy Hall, and that he recalls that customers had told him that Mr. Hall was a male prostitute.

4. On July 2,1998, I spoke with Ms. Rebecca House, co-owner of the Corner News, and Grocery, 2800 West Avenue, Newport News, Virginia, who informed me that she knew Timothy Hall, and that she heard from several customers, both before and after the murder, that Mr. Hall was a male prostitute.

5. On July 2, 1998, I spoke with Wanda Rogers, City of Hampton social worker, who was Timothy Hall's social worker in 1992, who informed me that she recalled speaking with a foster mother of Mr. Hall's, who provided her with medical information that led Ms. Rogers to believe that Mr. Hall was engaged in homosexual activity.

* * * *

## AFFIDAVIT

Bryan L. Saunders, first being duly sworn, states as follows:

I am an attorney at law, licensed to practice in the Commonwealth of Virginia, and have been at all times mentioned in this affidavit.

1. I have been provided with a copy of the petition for a writ of habeas corpus in this action and I am familiar with the allegation that I had a conflict of interest in representing Walter Mickens, Jr. I discussed the fact of my representation of Tim Hall with Mickens' current lawyer.

2. In my discussion with Tim Hall I did not obtain any information about his background and there was no suggestion that he was a male prostitute. I received no confidential information from Tim Hall that would have had any relevance to the issues in Walter Mickens' case.

/s/ Bryan L. Saunders
BRYAN L. SAUNDERS

Subscibed and sworm before me by Bryan L. Saunders this 11th day of August, 1998.

/s/ Illegible
Notary Public

My commission expires: 6-30-00

* * * *



[Filed Oct 26, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

---

Civil Action No. 3:98cv102

---

WALTER MICKENS, JR.,
*Petitioner,*

v.

FRED W. GREENS, WARDEN,
*Respondent.*

## ORDER

This matter is before the Court to set a briefing schedule on the issue of the disclosure of client confidences between Timothy Hall, deceased, and his attorney Bryan Saunders, and on the issue of depositions of trial counsel, Bryan Saunders and Warren Keeling.

It is ORDERED that the petitioner's brief on the attorney-client privilege issue shall be filed no later than November 2, 1998. The Commonwealth's response shall be filed no later than November 9, 1998; petitioner's reply, if any, shall be filed no later than November 13, 1998.

It is further ORDERED that, upon good cause shown. this Court grants leave of court for the taking of deposition testimony of Bryan Saunders and Warren Keeling. Mr. Saunders is hereby advised that he may wish to seek the advice of counsel of his own choosing regarding Mr. Hall's attorney-client privilege, and his legal, professional, and ethical responsibilities to his client.

The clerk shall send copies of this Order to all counsel of record, to Bryan Saunders, Esq., 753 Thimble Shoals Blvd., P.O. Box 1633, Newport News, Virginia 23601 and to Warren Keeling, Esq., 732 Thimble Shoals Blvd., Newport News, Virginia 23606.

It is so ORDERED.

/s/ Robert E. Payne
ROBERT E. PAYNE
United States District Judge

Richmond, Virginia
Date: October 26, 1998

I ask for this:

/s/ Robert J. Wagner
ROBERT J. WAGNER, ESQ.
VSB# 27493
Wagner & Wagner
700 E. Main St., Suite 1630
Richmond, Virginia 23219
(804) 644-3321

Seen and Objected to

/s/ Robert Q. Harris, Esq.
ROBERT Q. HARRIS, ESQ.
Assistant Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071

* * * *



[Filed Oct 29, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

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Civil Action No. 3:98cv102

---

WALTER MICKENS, JR.,

*Petitioner,*

v.

SAMUEL V. PRUETT, WARDEN,

*Respondent.*

ORDER

For the reasons stated from the bench on October 7, 1998, the Court will hold an evidentiary hearing, on Micken's Fifth and Sixth Claims as identified in his petition, on January 13, 1999 at 1:00 p.m.

The Clerk is directed to send a copy of this Order to all counsel of record.

It is so ORDERED.

/s/ Robert E. Payne
ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

Richmond, Virginia

Date: Oct 29 1998

BY MR. WAGNER

[11] A. It's not a lengthy interview. Matter of fact, in Juvenile Court if it's a young child, if it's not a serious charge which can be certified or where he can be treated as an adult, I usually have the probable cause statement, which tells me what the Commonwealth Attorney is trying to prove.

I go over brief facts, whether or not that's correct, if they have anything to say about it. Because [12] at the tail end, even if I lose, I'm going to get a social history.

I'm going to find out everything about them from the social history. I'm going to make my pitch at that time, at disposition, as to what is the correct disposition for this particular child.

So, I don't spend a whole lot of time interviewing them on minor offenses.

* * * *

[26] Q. Do you recall the circumstances of your appointment to the Mickens case?

A. The circumstances? I got a call from the Judge, and asked me if I would do her a favor and handle a capital case for her.

[27] And I, unfortunately, said yes.

* * * *

[28] Q. Had she appointed you to any other big cases before?

A. If you're talking about of the nature, of the magnitude of this case, no. I mean, I can't tell you whether I had handled drug cases in her Courts or whether or not—

I can guarantee you it hadn't been any murder cases in her Court, because I didn't have any juveniles charged with murder that I can recall right off-hand, right off-hand.

But I think it's just the natural—it was the natural flow of cases. If there was a robbery or something along those lines, and my name was up on the list that day that's what I got.



But the—shall we say, most Judges know not to just appoint somebody off the Bench for a capital case without checking with them first.

Q. I'm sorry? Just off the Bench?

A. Yeah; you're sitting on the Bench, you see a name, you've got a capital murder charge. It's not a good [29] idea to just go pick a name, especially if—even at that time, when there wasn't any capital qualification list.

As a common courtesy, it has been my experience that when you have a case of that nature, they will call you and ask you if you will take it.

Q. Do you recall when the Timothy Hall case was dismissed?

A. Yeah; I recall that.

Q. Were you in Court when it was dismissed?

A. In Court? No; I got ready to walk in, and they told me he was dead.

Q. I'm sorry; you got ready to walk in where?

A. Into the Court.

Q. Whose Court?

A. Into Judge Foster's Court.

Q. And who told you he was dead?

A. I think the Clerk told me he was dead and the case had been dismissed.

Q. Did you actually go in—

A. Not that I recall.

Q. —and see Judge Foster?

But right on the day and appointed time when you were supposed to go in on the case, you found out then that it had been dismissed?

[30] A. Yes; that's my best recollection.

Q. So, when you came into Court and your client wasn't there, what were you thinking?

A. Well, I thought he was sitting in the—there was a great big huge witness—I mean, clientele area.

And I think I had just walked in. Now, it may have even been before the case was called that they told me.

Because I was—I think that was the only case I was there for on that particular day in Judge Foster's Court.

And there was an attorney waiting area. So, I can't recall whether I was getting ready—I should say I can't recall whether I was getting ready to walk in.

I think it was. But then that doesn't make a whole lot of sense. Because I was told that it was dismissed because he was dead.

So, they wouldn't have called the case. You see what I'm saying?

Q. Well, do you recall the circumstances? It sounds like you don't, very clearly.

A. Well, I don't. I'm just saying I know they told me it was dismissed because he was dead, and I was in [31] Court or in the building that day. And that was it.

* * * *

[35] Q. Do you recall talking to me several months ago, and indicating that you had discussed that with Judge Foster?

A. Yes, I do. And, you know, that's because I didn't take my own advice. I gave you that answer off the top of my head, having a vague recollection of having broached this subject to the Court.

And after that conversation and sitting there and thinking about it, I remembered what it was. I can't say it was in Court.

I can't say whether it was going into court. I can't even say who brought it up. But it basically boiled down to, "Do you think anybody would let me out of this case because of that?".

Q. I'm sorry; you'll have to explain that. I don't understand that.

A. All right; well, it was a joke. The—

[36] Q. What was a joke?

A. My question. I'm not sure whether I raised it originally or somebody else mentioned that—the Hall situation.



But the question was, "Do you think anybody will let me out of this case?", the Mickens case.

Q. The question to who?

A. My question. I don't know who was there.

Q. So—

A. But I just remember—and that's what the vague memory was, that it had been brought up. And I thought it was in Court, but it wasn't in Court. I don't know whether it was in Court.

Q. Let me back up. You're saying that you had a discussion with someone in Court or out of Court or around the Court about your being appointed to the Mickens case?

A. No, what I'm saying to you is that, if I remember the timing correctly, it was either just before the preliminary hearing in this case or subsequent to the preliminary hearing, but it was in the Court building.

Now, the question was, "Can I get out of this case by Hall?". And, of course, I already knew the answer to that one.

No, I couldn't. Because there was no way I [37] could point to anything that would let any Judge let me out.

It was a joke. I have a very weird sense of humor.

Q. So, you never did bring this to the attention of any Judge?

A. No, I—no; I can't say that I ever brought it to—I have no recollection of having brought it to Judge Foster's attention.

I can guarantee you that it was not brought to anybody else's attention. Because by the time we would have got to any other Judge, we had gone through preliminary hearing.

And my—I'll put it to you very bluntly. Until you said a conflict of interest on the phone, five years later, six years later, whatever it is, it never even really entered my mind as a conflict.

It was a joke. It was a way I could have lied my way out of this case.

Q. Did you discuss this with Mr. Keeling?

A. I can't say I did, and I can't say I didn't. If Warren says I didn't, I didn't. I don't recall.

Q. Did you recently tell Mr. Keeling that you did discuss it with him back then, during the pendency of [38] the matter?

A. I think I told him everybody knew about it, and I thought we had discussed it. But if he says we didn't, then we didn't.

Q. When you say everybody knew about it, what do you mean by that?

A. Well, he knew about it, the Commonwealth Attorney knew about it. I just—it wasn't an issue to me.

It wasn't anything that was being concealed or anything that was being broadcast all over the world.

Q. But you never told Mr. Mickens?

A. I don't think I told Mr. Mickens. It wasn't a issue in the case.

Q. How do you know the Commonwealth's Attorney knew about it?

A. They had the files. I mean, they did a complete—have you looked at files I gave Mr. Pavek, those two boxes?

You take a look at it. There is a whole layout in there, that file, about Mr. Hall, the police investigation of Mr. Hall's background.

I think there was other things in there about Mr. Hall. And I can almost guarantee you—well, I'll [39] be—say this for a fact, that Howard Gwynn had to have known.

And I can also tell you this as a fact. That if Howard Gwynn thought there was a conflict of interest, he would have brought it to my attention.

He would have brought it to the Court's attention. Because - he has no more intention of re-trying this case than he does of walking on the sun.

Q. Did you ever discuss your representation of Timothy Hall with Mr. Gwynn?

A. How do you mean discuss? I mean, it was probably—I can't say. I don't recall having a sit down and saying,



"Howard, I represent Mr. Hall. I represented Mr. Hall. What do you think about this situation?".

Because, as I said, it's a non-issue. It was a non-issue. It continues to be a non-issue in Mr. Mickens' capital case, as far as I'm concerned.

Therefore, I don't see I would have had any reason to sit down and discuss that with anybody.

Q. So, you can't specifically recall discussing your representation of Mr. Hall with anyone?

A. No.

* * * *

[49] A. That he was at home? He wanted to testify. His mother testified that's where he was. There was nobody else to testify that that's where he was.

Q. Was there any other evidence that you could have used to prove that it was not an attempted sodomy?

A. Let's see; if I understand the question correctly, well, let's—all right; what do we have that would point to a non-attempted sodomy?

There were no—no physical evidence of any penetration, which is the reason I got it down from sodomy to attempted sodomy.

Q. You don't need to show penetration for attempted sodomy.

A. That's what I'm saying. That's the reason I got it down. But they have to prove an intent. They have to prove an overt act.

Now, how am I going to prove that those overt acts didn't occur, the intent wasn't there, if Walter's at home and he doesn't know anything about it?

All I can show is Walter's at home and he doesn't know anything about it.

Now, if you're asking what you're probably [50] asking, whether or not, based on the petition you all filed with the United States District Court, I could have gone out and shown that Timothy Hall was a male prostitute, no.

Besides that, I would have a little problem. Even if I could establish, even if I could, that he was a male prostitute, I'd have to lay a foundation for that being evidence in this case.

And how do you lay a foundation for that being evidence in this case? Walter would have to get on the stand and say that, "Yes; I hired him. We had voluntary sex or I attempted to have voluntary sex, and then I murdered him. But the underlying offense of attempted sodomy didn't occur."

And this would have been after I had already gotten his story that he was at home, and his parents' story that he was at home.

In other words, I'd have to have been willing—I would have to have been willing to allow him to lie on the stand in order to lay a foundation for that.

And I don't give a damn what the charges are. I'm not going to do that.

* * * *

[57] Q. Did you ever speak to Mr. Keeling about the defense of consent to the sodomy charges or attempted sodomy charges?

A. I don't believe so. It was never raised—I don't think he ever raised it with me. And I, as I said, I don't believe I discussed it with him.

Q. Did he ever tell you that a woman in his church had indicated to him that she was concerned that Tim Hall had been a homosexual?

A. Not to my recollection.

Q. Were you ever aware of any newspaper articles that had quoted Alexia Thrash or other people stating that Timothy Hall was or may have been a male prostitute?

A. Not until you—I didn't recall it until after you left. And then I recalled reading—not the article, but reading in the Commonwealth's file.

And as I said, when you listen, when you sit there, even with with the police officers who are investigating these cases, you will find out a whole hell of a lot of stuff.



Number one being that they fully investigated that aspect, and couldn't find anything to substantiate, when they were trying to find out who killed him.

[58] Q. My question to you is, though, did you see any newspaper articles where any witnesses had talked about Timothy Hall possibly being a male prostitute?

A. I don't recall seeing the newspaper article itself. I do recall that—I think you told me that that was the first article that came out; is that not correct?

Q. You're referring to a conversation we had several months ago?

A. Yeah, uh-huh.

Q. Where I came to your office and I spoke to you?

A. Absolutely.

Q. And I asked you were you aware of any information that Timothy Hall may have been a male prostitute?

A. No; I think you asked me if I was aware of that article.

Q. And what was your response?

A. At that time, I didn't recall that article. I didn't read the newspapers. Now, I still don't recall reading that article.

But I do recall—did recall, subsequent to our conversation, that there had been some statements made by somebody that I thought was in the Commonwealth [59] Attorney's file that they believed that.

Q. And what investigation, if any, did you do into those statements?

A. I didn't investigate that aspect at all.

Q. You mentioned dog tracks.

A. Uh-huh.

Q. Were you referring to the dog tracks in reference to the Timothy Hall case, or wasn't that the Woskobunik case?

I may have the name wrong, but—

A. I can't pronounce his name, either. But if the government could have figured out any way to get those dog tracks in this case, they would have done so.

Q. Okay; but do you remember if the dog tracks referred—if there were any dogs that were brought onto the scene of the Mickens case?

A. Well, the dog went—

Q. The Mickens/Hall case; I'm sorry.

A. The dog went from the scene of the second murder straight to the scene of the first murder, following Mr. Mickens' scent.

Now, I don't know whether you consider that being brought onto the scene. But that's what happened with that dog.

[60] Q. I'd like to talk a little bit about your relationship with Mr. Keeling.

Did you all have a sort of a joke name, that you called each other Batman and Robin?

A. I didn't call it that. He did. It suddenly came out of thin air. And I don't know why or where.

Q. What was your role in the defense of Mr. Mickens, compared with Mr. Keeling?

A. Oh, I'd say that probably ninety percent of it was supposed to be my responsibility.

* * * *

[69] Q. Didn't you have evidence that this crime occurred near a high crime area?

A. I had evidence that it occurred on the James River at the end of 28th Street, where there are a number of individuals who live.

Now, it's not a high crime area. All of the high crime areas that the police wish to consider high crime areas are on the other end of the City of Newport News.

The east end is not where you're talking about. What we have is two high rise apartments, plus a number of high rise—I mean, a number of other housing units.

At this particular point in time, the taller of the high rises had just been built and was occupied, if I remember correctly, by about half the Newport News Police Department.



Q. Did you have evidence that this area where the crime was committed was frequented by prostitutes?

A. No; I did not have evidence of that.

Q. Did you have any information supporting that?

A. I had no information supporting that.

Q. There were no defensive wounds—

[70] A. Absolutely correct.

Q. Is that right?

A. On Mr. Hall; yes.

Q. Doesn't that suggest consent?

A. Not if he was rendered unconscious. That does not—

Q. Was there any evidence—

A. Sure.

Q. —that he was rendered unconscious?

A. Uh-huh; there was a blue mark on the neck. Which, the second time around, when I asked the Medical Examiner whether or not that would have been made while he was still alive, because of the color of it, I believe the answer was yes.

"And wouldn't that have rendered him unconscious?" And the answer being that was a possibility.

* * * *

A. I'm not saying that it's not an area where there's not prostitution. My recollection of the areas where prostitution was taking place was about five or six blocks north of there, where they were running all the sting operations.

* * * *

[76] We got an instruction, I believe, on first degree. But if you're asking me whether in my opinion making an argument on consent in the death phase of this case where consent or anything had not—no foundation had been laid in either the guilt or innocence phase or putting Mr. Mickens on the stand and having him say that—

Well, I wouldn't do that, because they didn't believe him in the first place. I wouldn't have put him on the stand to say that in the death phase.

But in my personal opinion, arguing that to this Jury or any Jury, that, "You've got to find—not give Mr. Mickens the death penalty because the victim was a male prostitute.", is going to get him the death penalty, almost guaranteed.

Q. Did you consider putting on any evidence to attack the victim?

A. No.

Q. Why not?

A. All right; as I said—well, let me put it [77] to you this way. We have a white, seventeen year old male, stabbed a hundred and forty-three times.

We're trying to, in effect, make the government prove its case beyond a reasonable doubt, raise at least a possibility of getting out of the attempted forcible sodomy.

And you have a Jury that consists of six males, six females, six blacks, six whites.

I have—you are asking me, under those set of circumstances, where at the time that I would be attacking him or putting on evidence, the defense side, I've had police officers testify about his statements at the time he was arrested and given the warrants.

I've had an admitted drug addict who purchased the shoes. I've had the jailhouse statements. I've had all the photographs come in. I've had the D.N.A. evidence come in.

And you are asking me to tell that Jury bad things about the victim? You want me to hand them the rope, to hang him right there in the courtroom?

Because that's exactly what that Jury would have done.

* * * *

[80] But no; because the first thing out of Howard Gwynn's mouth was there would be no deal. "This is a [81] death case, and that's what we're going for."

That was the extent of the conversation, right there. When they put it to you that way, you may as well end it.

Q. So, you never pursued it further?



A. There wasn't any purpose to pursue it further. At the time I saw Howard, it was clear. He'd already made that statement.

And I tell you, when Howard Gwynn makes that statement and his evidence starts building in his favor, you can just forget it.

Q. How many times, if you recall, did you discuss a consent defense or the issue of Timothy Hall maybe being a male prostitute with Mr. Keeling?

A. I don't recall having discussed the issue. I mean, I know there was some conversation, that he would tell me about what was going on as far as the—he mentioned the church.

* * * *

[84] Did you ever discuss the issue of consent with Walter?

A. It never came up. Because he never gave me any indications that he had been with Hall, that he had seen Hall. So, it never came up.

Q. Did you discuss your representation of Timothy Hall with anyone after being appointed to the Mickens case?

A. I don't recall whether I did or did not. As I said, I know it was mentioned, that I gave that scenario the first time, at preliminary hearing, either before or after, in the corridor or outside.

But otherwise, it wasn't an issue, in my mind.

Q. Do you see anything wrong, potentially, with a lawyer who represents a victim on a criminal charge and then represents the Defendant who is alleged to have attacked or killed that victim?

A. Depends on what the circumstances are. If the representation of the victim had anything to do directly with the representation for which the second [85] party is charged, then of course there's a problem.

If they are not related in any manner, and if on top of everything else you're not going to be cross examining your prior Defendant, because he's dead, I don't see anything wrong with it.

Q. Whose decision is that to make?

A. Pardon me?

Q. Whose decision is that to make?

A. Initially, it would be mine, whether there was a confict or not. And if there is no conflict, whose decision—

Q. So, you see it as a potential conflict?

A. I don't—well, only under a given set of circumstances. If the first client—if the representation in that particular case has anything at all to do with the representation in the second case, such as this one was charged with stealing that one's car and this one is charged with beating the hell out of him, and the reason that he was beating the hell out of him was because the guy stole his car, and he's come in and told me, "Yeah; I stole his car.", even if I get him off, I'm going to have to cross examine him. And I can't do that.

But if he's charged with say burglarizing Joe Blow's house over here and this guy doesn't know Joe Blow, [86] he doesn't have anything to do with Joe Blow, and he's charged with murdering him during the commission of a robbery, they're not related.

Q. Don't you think your client is entitled to know?

A. It never occurred to me.

Q. Do you think the Judge presiding over the case should know?

A. For what purpose, I mean?

Q. To make the inquiry and a decision whether or not there is such a conflict.

A. Since I didn't see any conflict until you raised it on the phone, which was subsequently—some number of years later, other than as a joke, as, "Do you think I can get out of this case?", I would have had no reason to bring it to any—to the Judge's attention.

Because there wasn't any conflict. Understand that the conflict—simply because I represent A, and then B may have something that involves A, if the involvement is totally



different, it could be a business deal, if I represented A, that doesn't mean I can't represent B, who may have had business dealings with A, provided that two things are totally different.

In this case, from what—after having [87] pulled the file, I did find out I had the assault and battery against the mother, too. I didn't even remember that.

There is nothing in my representation of Hall

Q. Well, we're not going to go into that in these proceedings.

MR. HARRIS: I want to object here to that, your statement. He is allowed to talk about anything he wants to, as long as he doesn't reveal confidences of his own client in response to your question.

MR. WAGNER: Well—

MR. HARRIS: I mean, he gets to make those decisions; not us.

MR. WAGNER: Well, I don't believe so. I think there are certain parameters that were placed on this and that the law requires.

MR. HARRIS: Well, he gets to decide whether he has confidences from his client. I mean, that's sort of a threshold question here.

Well, go ahead; I don't care.

THE WITNESS: Do you want me to stop?

MR. WAGNER: Yes.

THE WITNESS: All right.

* * * *

DIRECT EXAMINATION—WARREN KEELING

BY MR. WAGNER

[6] Q. Who was your co-counsel in the Mickens case?

A. Brian Saunders.

Q. What was the name of the victim in the case?

A. Walter Mickens, Jr.

Q. I'm sorry. The victim.

A. The victim, Timothy Hall.

Q. Now, it has come to your attention that your co-counsel, Mr. Saunders, was representing Mr. Hall on criminal charges at the time of his death; is that correct?

A. I understand that now, but I don't remember that [7] back then.

Q. I understand, but it has come to your attention?

A. Right.

Q. In fact, you read the petition that's been filed in this court; is that right?

A. Correct.

* * * *

[13] Q. Other than—well, have you ever handled a case in Newport News Juvenile and Domestic Relations Court in which charges were dropped because the juvenile was deceased?

A. I can't say I have because the juvenile is deceased. I've had that happen in circuit court, where my client was deceased before I got there, but I can't recall it happening to me in juvenile court.

Q. Have you ever been present when another attorney has had such a situation?

A. Not that I recall.

Q. Now, who was the lead counsel in the Mickens case?

A. Mr. Saunders.

* * * *

Q. When you get appointed to a capital case, generally speaking, that case is going to be in the press, isn't it?

A. Oh, yes.

Q. So you will get some publicity through that case; is that right?

A. Right.

Q. And maybe even some work out of it as a result?



A. It depends on how you want to handle it. Some attorneys enjoy talking to the press. To my knowledge neither Mr. Saunders nor I ever really made any comments directly to the press about the case, that I recall.

Q. But your names were in the paper as a result of being on the case?

A. Sure.

Q. Are capital cases more lucrative as a court-appointed attorney than non-capital cases?

A. You earn more money on them because there's not a [16] cap. I mean, a felony back then the most you could get on say a malicious wounding would be $265. I don't know the limit on—probably 6 or 700 on the life-type cases. Capital cases didn't have that limit, but it was also a lot more work because you had to drop a lot of things to maintain it.

Q. Do you recall how many hours you expended on the Mickens case?

A. I don't recall.

Q. Do you recall how much money you earned on the case?

A. I think—I'm not sure, but it probably was $15,000 or more. I'm not counting about the second sentencing.

Q. Is it just for the first trial and the sentencing?

A. Fifteen to 20,000. I don't recall really.

Q. How would this compare with other cases that you would be appointed to?

A. Well, I just told you what you get paid.

Q. Who handled the guilt phase of the Mickens trial?

A. Mr. Saunders handled that phase of it.

THE COURT: Handled what?

THE WITNESS: The trial is what I call it, the guilt phase.

Q. Who handled the sentencing?

[17] A. I did the sentencing, that I recall.

Q. Did you question all the witnesses at sentencing?

A. I believe I did, but I'm not sure.

Q. Did you present the argument to the jury at sentencing?

A. Yes.

Q. Did you cross-examine all of the Commonwealth's witnesses at sentencing?

A. I don't remember. I really don't. Mr. Saunders may have. I don't recall, to tell you the truth.

Q. Did you do both the sentencing in 1993, the first sentencing, and then the sentencing again in 1996?

A. I remember personally that I was—I dealt with the family. I don't recall how we split it up the second time around. I'm pretty sure I made the closing argument, and Mr. Saunders, I think, made the opening.

Q. Did you handle most of the witnesses in the second sentencing?

A. The second sentencing was the family, and we had a prison guard from Mecklenburg that Mr. Mickens wanted us to call as a witness.

Q. Did Mr. Saunders conduct the entire guilt phase of the trial?

A. I would say yes.

[18] Q. In 1996 after the sentencing proceeding by the jury a few months later, there was a presentence report prepared, was it not?

A. (Nodded head affirmatively.)

Q. You'll have to answer yes.

A. Yes.

Q. There was a sentencing by the judge?

A. Yes.

Q. Pursuant to the preparation of that presentence report; is that correct?

A. Correct. I think it would have been Judge Askew.

THE COURT: Are you talking about the second sentencing?



MR. WAGNER: This would be the second sentencing, Judge, 1996.

Q. Who presented argument at that sentencing hearing before that judge; do you recall?

A. I believe that was Mr. Saunders.

Q. Was the presentence report introduced into evidence to the best of your knowledge?

A. Yes. It would have been part of the record.

Q. Let me show you what we'd like to have marked as Defense Exhibit 1, a copy of that presentence report.

THE COURT: Have you got a copy of it for me?

[19] MR. WAGNER: I sure do, Judge.

Q. Do you recognize that?

A. Yes.

Q. Is that the presentence report that was introduced ;into evidence in 1996?

A. Yes.

MR. WAGNER: I would ask that that be admitted, Judge.

THE COURT: You don't happen to have an extra copy for us, do you?

MR. WAGNER: I sure do.

MR. HARRIS: Judge, I have no objection. I believe it's already in the record as part of the state court record that the Court has.

THE COURT: I think it is too. At least there's been reference to it, I'm sure.

All right. So Defense Exhibit 1 is admitted.

MR. WAGNER: Thank you.

THE COURT: Excuse me. It's Petitioner's Exhibit 1.

(Petitioner's Exhibit 1 was admitted into evidence.)

BY MR. WAGNER:

Q. In the last page of that presentence report, [20] there's a statement by Timothy Hall's mother, a victim impact statement. Do you see that?

A. Yes.

Q. Do you recall Mr. Saunders making any comment at that sentencing hearing about that statement?

A. I don't recall personally, no.

THE COURT: Are you talking about is there any other information you wish the Court to consider about the impact? Is that what you're talking about?

MR. WAGNER: The victim impact statement comprises of, I believe, the last three pages.

THE COURT: Yes, but are you talking about the last page?

MR. WAGNER: I'm sorry. It would be the second to last page, Judge.

THE COURT: So what is the question?

MR. WAGNER: My question was: At that sentencing hearing did Mr. Saunders make any reference to any statements made by Timothy Hall's mother pursuant to this statement, Judge. If you referenced it—

THE COURT: Which paragraph are you talking about, 4 or 5?

MR. WAGNER: Actually, it's that whole page there. There are statements, for instance, Section [21] 3A, the victim's mother stated, "As a result of the offense"—

THE COURT: 3A all the way to the end?

MR. WAGNER: That's correct.

THE WITNESS: Your Honor, I don't recall either Mr. Saunders or myself, whether or not we commented about this or not. I don't recall.

Do you need this extra copy?



MR. WAGNER: You can just leave it there. That's fine.

BY MR. WAGNER:

Q. Now, of the two of you, Mr. Saunders and yourself, who was the more experienced?

A. Mr. Saunders.

Q. Who was more knowledgeable in the law in your opinion?

A. Mr. Saunders in my opinion.

Q. Did you rely on Mr. Saunders for his expertise in preparing the case?

A. I would say yes.

Q. Did you rely on him specifically in preparing your sentencing phase of the case?

A. We discussed it, but it wasn't where he was directing me exactly what to do. We talked about it. I suggested a course of action I was going to take. [22] It seemed agreeable with him, and that's what we did. I wouldn't say he generated that and had me fine tune it. It probably was the other way around, if anything.

Q. Okay.

A. The work that I did.

Q. You discussed strategy for sentencing purposes with Mr. Saunders?

A. Right.

Q. Did you review the Commonwealth's files yourself?

A. Yes.

Q. Did you review Mr. Saunders' notes of the Commonwealth's files with Mr. Saunders?

A. Yes.

Q. Did you all review the Commonwealth's files together?

A. No.

Q. But you're certain you reviewed Saunders' notes of the Commonwealth's files with Mr. Saunders?

A. Yes.

Q. Did you discuss possible defenses to the charges, specifically the capital murder charge, the attempted forcible sodomy charge with Mr. Saunders?

A. We discussed all types of defenses. I don't recall all our discussions. Part of this time there [23] were two cases that we had been given. The other one was nol prossed. So a lot of the notes and review also—

Q. You're talking about two charges against Mr. Mickens?

A. Right. One of them was—and I can't spell the name. it is Woskobonik. That was nol prossed. But a lot of our notes would also reference the investigation with that until it was nol prosed.

Q. I'm talking specifically about the Mickens case, whether y'all discussed strategy, discussed defenses of Mr. Mickens in preparation for trial.

A. Correct.

Q. And the answer to that would be yes?

A. Yes.

Q. Did you discuss information that could be used in mitigation?

A. We didn't have a lot of information, really. We had the family, but we discussed—and our main discussions were we were worried about it because we really didn't have that much.

Q. Did you discuss with Saunders rumors of Mr. Hall's male prostitution and homosexuality?

A. We had heard those rumors in the deposition, and I recall from the newspaper there was one comment. It [24] might have been a comment in the newspaper. I'm not sure to that reference, but that he would go out on the street.

Q. And you discussed that with Mr. Saunders?

A. Right.

Q. How many times did you discuss that; can you recall?

A. No, I don't know.



Q. You had obtained information from a woman at your church about Timothy Hall, the victim; is that correct?

A. Right.

Q. Please tell the Court what the woman told you.

A. The Hall family had been helped by some elderly ladies in our church. This would have been First Baptist Church, Newport News. At the time the church had two locations. It had, you might say, a dying downtown location and a suburban location. I didn't attend the downtown location, but I did talk to a lady once.

She was upset that I was representing Mr. Mickens, who had killed Hall because they had worked with trying to, quote, get them straightened out. And this would have been several years prior to the murder, but she was familiar with Timmy Hall.

[25] Q. What did she say about Mr. Hall?

A. That he was from a, I guess, a troubled situation.

THE COURT: What?

THE WITNESS: He was from a troubled situation.

A. And they were working with him and that she was upset that I represented the person who was charged with killing him.

Q. What did she say, if anything, about him being on the street?

A. I don't recall in particular. The downtown location tried to do some inner-city ministry. And a lot of times those people are homeless and roam about, but right now I can't remember in particular what she said.

THE COURT: Did she talk to you at all about the fact that he was reportedly a male prostitute?

THE WITNESS: No, Your Honor.

Q. Well, let me follow-up on that.

Did she tell you that she was concerned that he was a homosexual?

A. I don't remember. She may have, but I don't recall.

Q. Do you recall in your deposition being asked that question?

[26] A. Yeah, I do.

Q. Do you recall your response to that question?

A. No, I don't. And I tried since to remember who it was I talked to and I'm certain she's not around, but I was trying to remember what her name was, because after you asked me that I was trying to think who it was. And I asked a couple of people at church, but they couldn't answer me.

Q. Let me show you page 38 of your deposition, line 15 through 19. Let me let you take a look at that.

A. Yes.

Q. Does that refresh your recollection about what you said at deposition?

A. Right. And I probably asked her if she knew if he was a homosexual.

Q. What was her response?

A. She couldn't answer that.

Q. But didn't you say that they didn't know if he was a homosexual or not?

A. Right.

Q. But they were concerned that he was homosexual?

A. They were concerned he was kind of a street person.

* * * *

[28] Q. Did you share this information that you obtained from this woman with Mr. Saunders?

A. I'm sure I did.

Q. Did you share it with Mr. Mickens?

A. I don't recall if I did or not. I may not have.

Q. Were you concerned about your representation of Mr. Mickens as a result of knowing this information?

A. No.

Q. Knowing that someone in your church was concerned about your representing the killer of Timothy Hall?

A. No, that didn't bother me at all. If you do criminal law enough, you know people are always upset if you're



representing somebody who's committed a crime that they're not happy with. So that doesn't bother me at all.

Q. Did you discuss with Mr. Saunders a possibility of [29] a consent defense to these charges?

A. I don't remember talking about that in particular.

Q. Well, let me refer you to your deposition.

A. We talked about a number of things. I recall that our client insisted that he was going to testify and that he didn't do it.

Q. So are you saying now that you don't recall whether you spoke about a consent defense?

A. I'm sure we talked about every possible avenue. We talked about—

THE COURT: I think the question is: Did you talk with Mr. Saunders about whether or not to raise the defense that the victim consented to the sexual activity in which he was engaged at the time of the death. Isn't that the question?

MR. WAGNER: That's the question.

THE COURT: Did you talk with Mr. Saunders about that?

A. I probably did and in the context of that, if Mr. Mickens was going to not testify or if he was going to change his story as to he didn't do it. Obviously, that would be very important.

BY MR. WAGNER:

Q. Okay. You don't remember—

A. I'm still fuzzy on a lot of this, what we talked [30] about when we initially went through all of this before trial.

Q. Do you recall stating at the deposition that you did speak with Mr. Saunders about the issue of consent?

A. Right. That's what I'm saying. We discussed how the body was found face down with the legs 12 inches apart.

* * * *

[34] THE COURT: Let me try. Consent to sexual sodomy removes the felony aspect of the predicate offense of felony murder.

Did you and Mr. Saunders discuss whether there was available a consent defense to the sodomy?

Yes or no?

THE WITNESS: Yes.

MR. WAGNER: Thank you.

Q. About the consent defense, whose decision in your estimation was it whether you presented the defense of consent in the guilt phase?

A. I would say Mr. Saunders. He handled the trial.

THE COURT: Did you discuss with him presenting the consent defense?

THE WITNESS: Judge, I don't recall saying "Let's present a consent defense."

We discussed what defenses we could have based on the evidence of how the victim was found, and that's where I went on to explain in my deposition the facts that we had.

THE COURT: Well, I understand that, but your deposition is very rambling, and I don't want to be into rambling. I want to be into very precise [35] questions and answers.

My question is, did you discuss with Mr. Saunders the possibility of presenting as a defense to Mr. Mickens' charges that the sexual encounter started as or was consensual?

THE WITNESS: We talked about that, Your, Honor, yes, we did.

THE COURT: Who, if anyone, decided not to present that defense, I believe was Mr. Wagner's question?



THE WITNESS: That would have been Mr. Saunders. He handled the trial.

THE COURT: All right.

BY MR. WAGNER:

Q. Whose decision would it have been not to present it at the sentencing phase?

A. Probably both of ours.

Q. Did you discuss with Mr. Saunders the possibility of introducing any negative evidence about the victim at sentencing?

A. I recall us talking about it. I don't recall the details of the conversation, and I don't recall what hard evidence we had.

Q. So Mr. Saunders never shared with you any negative information that he might have had about the victim [36] Mr. Hall?

A. If he did, I don't recall it in particular. Nothing strike if you understand what I mean.

Q. Never told you that he was aware of Mr. Hall being arrested on a concealed weapon charge?

A. If he told me, I don't recall it.

Q. As far as you can recall, he never told you that he was arrested for assault and battery on his mother?

A. There again, if he told me, I don't remember.

Q. So you have no recollection of him telling you?

A. No.

Q. While preparing for trial, did Mr. Saunders ever tell you to the best of your recollection that he represented Hall?

A. I don't recall him telling me that. You can ask him if he did or not, but I don't remember it.

Q. There was a lot of publicity of this case at the time of the murder; was it not?

A. Yes.

Q. There was newspaper coverage?

A. Right.
Q. Radio coverage, if you recall?
A. I don't recall radio coverage.
Q. Do you recall any television coverage?
A. There was television coverage of the trial.
[37] Q. Was there television coverage in the news reports of the murder?
A. Probably was, but I can't really say. But I do recall the newspaper articles because I saved those for a while.
Q. Was the many Newport News legal community aware of this murder?
A. Yes.

MR. HARRIS: Objection, Your Honor, I think that calls for a conclusion the witness cannot give.

THE COURT: Sustained.

Q. Did you speak about this murder with people within the legal community?
A. Yes.
Q. Was it pretty much common knowledge?
A. Yes.
Q. Common knowledge that Mr. Mickens was charged with murdering a 17-year-old?
A. Yes. And I'm speaking among the attorneys who were doing criminal work in the courts in downtown Newport News.
Q. Sure. Now, there was a newspaper article, and I believe it's appended to the end of the deposition there. It's an April 1, 1992, article *from The Daily Press* in Newport News. It specifically references [38] quotes by Alysha Thrash.
Do you recall that article?
A. Yes. This is one I would have kept a copy of for a while.

* * * *



Q. You say you specifically recall this article; is that correct?
A. Yes.
Q. Getting back to that question, did you discuss this article with Mr. Saunders?
[40] A. I would say yes, we discussed it. I recall talking about just about every article in the paper with him.
Q. On the issue of consent, if you could have presented the jury with reasonable doubt as to whether or not that sodomy or sexual activity was consensual, what would have happened with the capital charges?
[41] A. It would have been a first degree murder if they would have ruled that there was no attempted forcible sodomy.
Q. So the death penalty would not have been an issue?
A. Correct.
Q. Consent here was very significant, wasn't it?
A. Yes.
Q. And in discussing consent with Mr. Saunders, he never revealed to you any information that he may have known about Mr. Hall, personal knowledge?
A. I don't recall that.
Q. What evidence did you have that the sexual activity may have been consensual?
A. The only evidence probably would be the remoteness of the location where the body was found. I mean, we've got rumors that he may have been a male prostitute. So we've got rumors, and then we have the location.
Q. The offense was committed near a high crime area; isn't that right?
A. Yes, in the sense of prostitution.
Q. I'm sorry?
A. In the sense of prostitution.
Q. And drug activity, as well?
A. Yes.

[42] Q. And concealed weapon charges, as well; is that right?

THE COURT: You say the location was in a prostitution area?

THE WITNESS: Your Honor, may I explain that?

THE COURT: Sure. But is the answer yes?

THE WITNESS: The answer is yes. It's Washington Avenue, which is near the shipyard. There are a lot of E-1's and UPS stationed in the area. There's a prostitution problem. It's an area where the city, quote, maps prostitutes. If a prostitute is convicted of prostitution in that area, he or she is mapped, and if they are found in that area again, their probation can be suspended. And this would have been in that general area.

* * * *

[45] Q. The prosecutor never argued that Mr. Hall was forced to this location, did he?

A. I don't remember him making that argument. There was no—by the time we got to trial, there was no abduction charge to go along with the attempted sodomy.

Q. That was thrown out at the preliminary hearing, was it not?

A. Yes. Because they couldn't prove how the parties got there.

Q. Right. In essence there was no proof that Hall was forced to the location; is that right?

[46] A. Right.

Q. And the prosecutor didn't try to argue he was forced to the location when the case got to trial, did he?

A. I don't recall him making that argument.

Q. So the argument could have been made that at least getting to that location was consensual?

A. Yes, it could be.

Q. And that was never made at trial, was it?



A. I have the transcript, but I didn't handle that part either. So I don't remember. During the trial I sat between Mr. Saunders and Mr. Mickens, and when he had questions and wanted to write notes, I responded to that so Mr. Saunders' attention wouldn't be constantly diverted.

Q. Right. The sexual activity was performed on a mattress, wasn't it?

A. Yes.

Q. And the mattress, when it is was examined by the police, had pubic hairs from several different people found on it, right?

A. Yes.

Q. So supposedly that mattress had been used for sexual activity in the past, right?

A. Yes.

[47] Q. And this was never brought out at trial, was it, or argued at trial?

A. I don't remember that.

Q. Did you discuss this with Mr. Saunders?

A. I remember us discussing the mattress, but beyond that I don't remember how we decided that was going to that used at trial. There again, he handled the trial itself.

Q. Recently, Mr. Saunders shared with you the petition that was filed in this court; is that right?

A. Yes.

Q. And you discussed the petition, did you not?

A. Yes.

Q. What did he tell you when you discussed the petition about whether or not—

MR. HARRIS: Objection, Your Honor. This sounds like it's going to be an obvious hearsay issue. He's going to have another witness here in a moment. He can ask what he said.

THE COURT: Overruled.

Q. What did he tell you about whether or not he had discussed his representation of Hall with you previously.

A. After I reviewed your petition, he said that he had told me that. I just don't remember it.

[48] Q. So the first time you can recall that you had knowledge or remember having seen that he represented Hall was when you saw the petition; is that correct?

A. Yes.

Q. Did he tell you that he was sure that he mentioned it to you?

A. He said something to the effect that he was pretty sure that he had told me. I just don't remember him telling me that.

* * * *

CROSS EXAMINATION

BY MR. HARRIS

[50] Q. After you were appointed and Mr. Saunders were appointed to this case, did the two of you ever meet and set down and decide who was going to investigate the case?

A. We both investigated it. I don't recall what decision we made. We didn't make a decision that I was going to investigate it and he wasn't or vice versa.

Q. So is it your belief that both of you were investigating?

A. That's my belief.

Q. Both the defense and the guilt phase and the possible evidence for sentencing?

A. I think initially; although, I also recall telling Mr. Saunders that I would take the family. They would call me, and I would have them come to my office, keep them informed because early on we knew that Mr. Saunders was going to do the trial. And if Mr. Mickens is found guilty, then I would be presenting evidence in way of the family and whatever else we could get for the sentencing phase.

THE COURT: So basically Saunders investigated the guilt-phase questions, and you [51] investigated the sentencing-phase questions. Is that what your answer means?



THE WITNESS: Yes, Your Honor.

Q. Did you also investigate the guilt phase issues?

A. Yes.

Q. Did you go out and talk to witnesses that might know something about the crime, the murder of Timothy Hall?

A. I talked to—I can't call them witnesses because I didn't get anybody to tell me anything, anything definite, but yes, I did go out and ask people. And there's a Corner Store there that would have been mentioned in the deposition, that I had gone in a couple of times to see if anybody knew Timmy Hall, but I didn't get any results from that. And the reason I went there is because he lived pretty much across the street.

Q. In that part of downtown Newport News there was a nearby store?

A. Something like the Corner Store or Corner Grocery or something to that effect.

Q. How many times did you go there?

A. Several times.

Q. Did you speak to any other witnesses in the neighborhood who might have known Timothy Hall?

[52] A. I talked to—I think it was the father of the family that he was living with. I think that was way in the preliminary hearing.

Q. Would that be Bernard Gordon?

A. Yes, the Gordon family. Rashad Gordon's father, I believe.

Q. Is Mr. Gordon the witness who died before trial? If you recall?

A. I don't recall him dying, but there was another witness who died. He was a person who had gotten some tennis shoes, and I can't think of his name right now.

Q. I'll move on. As far as the evidence of this newspaper article that you've been shown that talks about the finding of a body and the discussion with people who knew Timothy Hall, that is undated in the record.

Do you know about when that was in relation to the time of the crime?

A. No, I don't, but I would presume it was in April of that year. The article, itself, had comments from others who were adamant that he wasn't a homosexual.

Q. Well, let me ask you about this: You had information, then, from this newspaper article—I take it you saw this newspaper article soon after you were appointed?

[53] A. Correct.

Q. Even if it had actually been published before you had been appointed to represent Mickens?

A. Correct.

Q. And based on that information in the article, did you conduct any investigations at all to try to determine whether or not Timothy Hall was a male prostitute or a homosexual?

A. Yes.

Q. What did you do?

A. I talked to a lady at church, and I went to the Corner Store a number of times to ask people if they had known Timmy Hall. I just basically said who I was, and I was working on that particular case.

Q. And you mentioned you talked to the father of the family where he was living?

A. Right.

Q. Did that man indicate to you in any way—

MR. WAGNER: Can we have a time frame, please?

MR. HARRIS: I'm sorry?

MR. WAGNER: Can we have a time frame, please?

THE WITNESS: I believe at the day of the preliminary hearing is my recollection is when I [54] talked to Mr. Gordon about Timmy Hall.

BY MR. HARRIS:

Q. Did you have any indications from Mr. Gordon that Timothy Hall was homosexual?

A. No.



Q. Or a male prostitute?

A. No.

Q. That he used drugs?

A. I didn't get that from Mr. Gordon.

Q. That he drank?

THE COURT: Let's go back. The series of questions was what efforts you made personally to determine whether he was or wasn't a male prostitute.

Did you talk with Mr. Gordon about whether he was or wasn't a male prostitute at the preliminary hearing?

THE WITNESS: Yes.

THE COURT: What did Mr. Gordon tell you?

THE WITNESS: To his knowledge he said Timmy wasn't. Your Honor, Mr. Hall had moved in and lived in his house, but he hadn't been there what I would call an extended amount of time.

BY MR. HARRIS:

Q. Now, the area where Mr. Gordon lived and where Timothy Hall lived for this period of time is in [55] downtown Newport News?

A. Yes.

Q. And in that general area of Newport News, you indicated earlier that was an area known for prostitution?

A. Correct.

Q. Is that the same area where Timothy Hall lived with the Gordons?

A. Yes.

Q. So he lived in an area that was known by someone as an area for prostitution?

A. Yes.

Q. As far as the—and the only reason he lived there is because he lived with the Gordons, as far as you knew?

A. As far as I knew. He was not living with his mother at the time.

Q. Did you talk to any other witnesses about—well, let me back up a minute.

You indicated you spoke to a woman in your church about whether Timothy Hall was a homosexual?

A. Uh-huh.

Q. Can you answer that question out loud?

A. Yes, I spoke to her, and I would have asked her if she knew if he was a homosexual or not.

[56] Q. Did she bring this to your attention, or did you seek her out?

A. I sought her out.

Q. And in the context of the question you were asked a little while ago about whether the women told you that he was a homosexual, was that information they volunteered, or was their uncertainty a response to a question you asked them?

A. I would have asked them if they knew if he was a homosexual. They wouldn't—I mean, I asked all the questions when I spoke to the lady. The way that came about is somebody at my location said, "Oh, I remember when I used to go down there I knew Timmy from when he was younger." And she, I believe, gave me a name—whoever it was I spoke to, and I don't remember who it was. She was fairly elderly at that time.

Q. Once you learned there was someone in your church who knew Timothy Hall, you went to that person and asked them information about Timothy Hall?

A. Right.

Q. Other than Mr. Gordon, the lady at your church and the people at the Corner Grocery store, is there anyone else you spoke to in investigating whether or not Timothy Hall was a homosexual or a male prostitute?

[57] A. Not that I know of.

Q. Did you speak to any—



THE COURT: Excuse me, Mr. Harris.

Why were you asking people whether he was a male prostitute or a homosexual? Why were you asking those questions?

THE WITNESS: Hopefully to find some evidence about the victim that we could use as admissible evidence at trial.

THE COURT: To do what?

THE WITNESS: In a sense put the victim's, what little we could, character at issue.

MR. HARRIS: Your Honor, if your question is if the why question was more temporal, then these investigations you did was after you saw this information in the newspaper?

A. Yes. And I—

BY MR. HARRIS:

Q. Is that what prompted you to investigate this?

A. Yes. I would say yes.

Q. Now, you're an attorney. You have been practicing law for almost 20 years?

A. Yes.

Q. Are you familiar with the rape shield statute in Virginia?

[58] A. Yes.

Q. Do you know under what circumstances you can offer into evidence a victim's prior sexual conduct?

A. No, I can't right now.

Q. Is it your understanding that the rape shield statute allows you to offer any evidence attacking a victim's character by showing they may be homosexual?

A. No.

MR. WAGNER: Objection, Your Honor. He says he doesn't know.

THE COURT: Sustained.

Q. As far as the—you had an opportunity, also, to look at the Commonwealth's Attorney's records?

A. Yes. The Commonwealth's Attorney has an open-file policy. You can call and go look at it.

Q. He includes in his open file witness statements that police may have taken?

A. Yes.

Q. You recall looking through the Commonwealth's Attorney's file and seeing witness statements of folks that police talked to about the crime?

A. I recall doing that. Mr. Saunders looked at the file first and made extensive notes. So I went and looked at the file, but since he had made the notes, I didn't see it necessary to kind of duplicate that.

[59] Q. Now, many of these—you do recall there are witness statements in this file?

A. Yes, Yes.

Q. And many of these witness statements, in fact, were taken before they had a suspect arrested?

A. Yes.

Q. This was at a time when they were looking for someone who may have committed this crime. Do you recall, looking through those documents, whether there was any mention from any witness that Timothy Hall was a homosexual?

A. I don't remember anything in there indicating he was a homosexual.

Q. Do you recall, looking through that file, any mention—well, let me ask you this, to change just briefly—

THE COURT: Let me ask you to go back a minute so I can put a fine point on that.

Are you saying you recall looking at the statements and you know they didn't contain anything about whether he was a homosexual, or you simply can't recall whether they did or did not?



THE WITNESS: I recall looking at the statements. I don't remember statements indicating he was a homosexual.

* * * *

[61] Q. Could you tell us, if you can recall, what evidence you had that Timothy Hall was a homosexual?

THE COURT: When?

Q. At the time you were preparing for trial.

A. The newspaper article that was referenced to it.

Q. In addition to the newspaper article indicating he was a homosexual, what information, if any, were you aware of—well, what information, if any, were you aware of—excuse me—that Mr. Hall was a male prostitute?

A. I didn't have any information that he was male prostitute except for what was reported in the newspaper. It indicated that he—

* * * *

[62] THE WITNESS: I had at least a half a dozen articles at one time, and I kept them up through the—past the—sometime past the trial phase. After they turn yellow, I have no use for them. I don't keep them after that.

THE COURT: Did each of those articles mention either or both of the fact that Mr. Hall might be a homosexual or might have been a male prostitute?

THE WITNESS: I think that would have only come up once, maybe twice, without looking at the papers, but I don't recall that being a theme in the—well, it wasn't a theme in the reporting from the Daily Press.

* * * *

[67] Q. Did you ask Mr. Mickens what he knew about the murder of Timothy Hall?

A. Yes.

Q. Did he tell you that he had any knowledge at all of the circumstances of the death of Timothy Hall?

A. He said he didn't know anything about it that he was sorry it had happened to him, but he didn't do it. He didn't know why they were trying to put it on him.

Q. Now, did he tell you this just on the first time that you sat down and talked to him?

A. Yes.

Q. Did he tell you this on any subsequent occasion?

A. Every time. He denied any knowledge to it every time I talked to him.

Q. Did you, yourself—I'm not speaking of Mr. Saunders but you, Warren Keeling—ever talk to Walter Mickens about the circumstances of the body being found on the mattress under the Basic Construction building?

A. Yes.

Q. Did you ever discuss with Walter Mickens anything about the circumstances of the body that would suggest that maybe someone had consented to sodomy?

A. I don't recall telling him that.

[68] Q. Did you ever discuss with Mr. Mickens at all that it would be perhaps helpful to his case if there had been some evidence that he had had something to with the consensual relationship or not?

A. Mr. Mickens denied having anything to do with Mr. Hall at all.

* * * *

[69] Q. Did that ever come up at all in your discussions with your client?

A. Not that I remember.

Q. Your client testified at trial to the extent that you just described. Did he testify that he didn't do this crime?

A. Correct.

Q. Whose decision was it that Walter Mickens testify at his trial?

A. Walter's.

Q. Did you discuss with Mr. Mickens the advisability of his testifying to that effect in this trial?



A. Yes.

Q. And did you suggest to him that he might be better off not testifying at all?

A. I didn't want him to testify, personally.

Q. Did you recommend to him that he not testify?

THE COURT: Did you tell him that?

THE WITNESS: Yes, Your Honor.

Q. Did you recommend to him that he not testify?

A. Yes.

Q. But he chose to testify anyway?

A. Yes.

* * * *

[71] Q. Do you recall whether he testified that he did not know Mr. Hall at all?

A. To my recollection he testified he did not know Mr. Hall, did not know that person.

Q. Now, this was in the guilt phase of the trial.

A. Yes.

Q. Do you recall who examined Mr. Mickens when he was on the stand?

A. I don't remember.

THE COURT: You mean which of the defense lawyers?

Q. Whether you or Mr. Saunders examined him during his direct testimony.

A. I don't remember right now.

Q. Had you ever discussed with Mr. Mickens prior to his testimony the issue of whether he may have run into Hall somewhere else in the Newport News area?

A. I don't think that I did, but I don't recall. He insisted he didn't know Mr. Hall at all.

* * * *

[76] Q. Now, the Judge asked you several questions earlier about a discussion with Brian Saunders about a pos-

sibility of a consent defense and do you recall the questions you were asked earlier about a consent—discussions of consent?

Were you and Mr. Saunders actually discussing it in terms of a consent defense? Were y'all that particular in your discussions, we can offer a defense of?

A. I don't recall us ever saying that we can use an [77] issue of consent as defense.

Q. Can you explain for me and the Court the context in which you had discussions with Mr. Saunders that you're describing as a discussion about consent?

A. Well, we had our client insisting that he didn't do it, didn't know the person, wasn't there. So I didn't see how I could get up and argue that it was consensual with Mr. Mickens if he's going to take the stand and deny ever having any contact with the victim at all.

THE COURT: Well, if that was the case, why were you even discussing the issue of consent?

THE WITNESS: The issue of consent, my recollection, is how the body is found, bruising to the neck, stab wounds from the back, no defense wounds. And I think I mentioned at the deposition that I was afraid if I started harping on consent, the Commonwealth's Attorney would be given a field day as far as how the victim was murdered and what the medical examiner would testify about the death.

BY MR. HARRIS:

Q. Is it fair for me to say that your discussions with Mr. Saunders about consent were a defense that would exist in the absence of your client's testimony?

A. That's fair, yes, but Walter insisted on [78] testifying.

Q. You indicated earlier in your answer to Mr. Wagner that you had had joint discussions with Mr. Saunders about strategy and defenses at trial.



Were these agreeable discussions about strategy, or did you all disagree about the way to present the case?

A. Agreeable.

Q. Do you recall any instance where you suggested any matter you might want to bring out at trial and Mr. Saunders vetoed it?

A. No.

Q. You have told us today that you were primarily responsible for handling the sentencing phase?

A. Yes.

* * * *

REDIRECT EXAMINATION

BY MR. WAGNER

[81] Q. Addressing the investigation briefly, the lady at church, she approached you, didn't she? You didn't approach her; is that right?

A. Not the one that I talked to that had worked with him.

Q. Okay.

A. Someone else initially made the comment to me that they didn't like the fact I was representing Walter and that she and someone else at one time had worked with the family. The other person being the one who had been involved. The lady that I had the initial conversation knew who Timmy Hall was, but any conversation that I had, any details, she wouldn't know. She knew that her friends had worked with him.

Q. Did you make any notes of that conversation?

A. I don't remember making notes of it.

Q. The newspaper article that's been referenced, there are a lot of quotes by Alysha Thrash; is that right?

A. Uh-huh.

[82] Q. Do you recall from the Commonwealth's file that the address and phone number of Alysha Thrash were in the file?

A. They almost always are. I don't remember right now looking at that report.

Q. Did you ever call her?

A. I never spoke with her.

Q. She was the one who made all the comments about male prostitution; is that right?

A. Right.

Q. You never tried to call her?

A. Not that I remember.

Q. Did you try to call any of the witnesses that were in the Commonwealth's file?

A. I tried to call—I may have tried to call one or two. Mr. Saunders, I think, may have also. But I was trying to—

Q. Do you have any specific recollection of calling any of the Commonwealth's witnesses in the file?

A. No.

* * * *

[87] A. I'm sure I told him that some people from our church knew Timmy Hall, but I don't recall telling him that I was talking to them about whether Mr. Hall was a homosexual or not. Is that the question you're asking?

Q. Well, do you recall—

A. He was aware that some ladies at my church were upset that I was representing him.

Q. And so you recall talking to him about these people in your church, that they knew Timothy Hall?

A. Yes.

Q. Why did you tell Mr. Mickens that?

A. General conversation.

Q. Do you think he had a right to know?

A. I don't see where it was important, if the people at my church didn't like the fact that I was representing him. But I told him that, and when you go to see somebody every week, you tell them what you did this week or who you talked to, things of that nature.

Q. Did you tell him because you wanted to let him know that maybe he was concerned it would present a conflict for you?



A. That wasn't a conflict. So I wasn't concerned [88] about a conflict because somebody I knew didn't like the fact I was on the case.

* * * *

BRIAN SAUNDERS, a Witness, called by the Petitioner, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WAGNER:

Q. I just want to hand a copy of your deposition to you. Please state your name for the Court.

A. Brian Saunders.

Q. How are you employed, Mr. Saunders?

A. Private practicing attorney in the City of Newport News, Virginia.

Q. And how long have you been in private practice of law?

A. Twenty-five years.

Q. Has your practice always been in the Newport News/Tidewater area?

A. That's correct.

Q. What does your practice now principally focus on?

A. Criminal defense.

Q. And in 1992—

THE COURT: Excuse me, just a minute. Would you take your hands down.

THE WITNESS: I'm sorry, Your Honor.

THE COURT: And speak up. We have a bad [93] sound system, and it's so hot in here we had to open the windows. So we have a double whammy on hearing you, if you don't mind speaking up.

THE WITNESS: I apologize, Your Honor.

THE COURT: That's all right.

THE WITNESS: I didn't hear—

THE COURT: Criminal defense is your practice now and in 1992—

BY MR. WAGNER:

Q. And in 1992?

A. 1992 it consisted basically of that. Although, there were some civil aspects to it also.

Q. How long have you been in the practice of criminal law?

A. Twenty-five years.

Q. Prior to April of 1992, how many capital cases had you been appointed to?

A. Two.

Q. How many capital cases had you tried?

A. I had to try? None.

Q. So the Mickens case which you were appointed to in April of 1992 was the first capital case you had to try; is that correct?

A. That's correct.

Q. You never selected a death-qualified jury before?

[94] A. That's correct.

Q. Never went through a sentencing phase before; is that correct?

A. In a capital case?

Q. In a capital case.

A. Right, that's correct.

Q. Prior to April of 1992, how many criminal jury trials had you conducted?

A. I can't give you an honest answer to that. Hundreds, I guess. You know, I . . .

THE COURT: When did you start practicing?

THE WITNESS: 1973.



Q. In every jury trial case that you can recall having tried, doesn't the judge ask the prospective jurors if—with a victim in the case, if any of those jurors know the victim?

A. That's correct.

Q. And if a juror answers that he does know a victim, then the judge follows up with a series of questions; is that correct?

A. From my experience, yes.

Q. Questions to determine if that juror would be unbiased; is that right?

A. That's the purpose of it, yes.

Q. Now, you represented Mr. Hall in some criminal [95] charges in the Newport News Juvenile and Domestic; Relations Court; is that correct?

A. That's correct.

Q. Don't you think that the judge should have known that you represented the victim on a case you were trying where you represented the defendant?

MR. HARRIS: Your Honor, if I could just ask him to specify which judge he's talking about?

Q. Any of the two judges that you appeared before in this case, Judge Foster or Judge Askew.

A. I'm not exactly sure how to answer that question. I wasn't on the jury. I wasn't going to be making the decision one way or the other as to guilt or innocence. It wasn't, in my mind, an issue.

THE COURT: I don't think he's asking with respect to the jury. I think he's shifted grounds now; is that right?

MR. WAGNER: That's correct.

THE COURT: Ask your question again.

Q. My question simply is, don't you think you should have told the judge that you represented the victim in the case you were trying?

A. It didn't occur to me at the time. As I said, that was not an issue in my mind. So I guess at this point in time under the circumstances now, the answer [96] would be yes, but in 1992 or '93, it never occurred to me.

Q. You were appointed to represent Mr. Mickens on April the 6th of 1992; is that correct?

A. I don't recall the exact date, but I was appointed in the early part of April of 1992, yes.

Q. Do you recall on April the 3rd of 1992 charges against Mr. Hall were nol prossed? Is that right?

A. I don't recall the exact date, and I don't know whether it was in April. I do know it was probably in April. I think the body was discovered at the first part of April, or it might have been the end of March. I don't recall the date.

Q. Do you recall the date that you appeared on the Timothy Hall charges? They were concealed weapon, assault and battery against his mother; is that correct?

A. That's correct.

Q. Do you recall if the date that you appeared on this charge was a Friday?

A. No, I don't recall the date. I don't recall the day of the week.

Q. Do you recall going into court and having the judge dismiss the cases in court?

A. No, I remember somebody telling me he was dead and [97] that the case has been dismissed.

Q. So you don't recall ever actually going into court and having the cases dismissed?

A. No. I can't say it was done in court. I remember somebody telling me that he was dead and that the cases had been dismissed.

Q. And this case was before Judge Aundria Foster; is that right?

A. That's correct.

Q. And Judge Aundria Foster was the judge who appointed you to the Mickens case; is that correct?



A. That is correct.

Q. Do you remember there was a lot of publicity surrounding the case in Newport News at the time you were appointed to the Mickens case?

A. I remember there was—there was a lot of publicity during the whole period of time.

Q. Publicity about the case?

A. About the case, yes, sir.

Q. Numerous newspaper accounts?

A. I gathered them up.

Q. There were television spots on news programs?

A. I have no idea.

Q. Now, when you were appointed to represent Mr. Hall, you were appointed to represent him on both [98] of those charges, concealed weapon and assault and battery; is that right?

A. At this time I do have that as correct.

Q. And you met with Mr. Hall in your office regarding that representation?

A. That's correct.

Q. You spent approximately 20 minutes with him; is that right?

A. It could have been 15 minutes. It could have been a half an hour. It was not a lengthy interview.

Q. Pursuant to that meeting with Mr. Hall, you decided that you were going to pursue a Motion to Suppress on the concealed weapon charge; is that right?

A. Not pursuant to that meeting, I don't think. I think that I pulled the file and reread the probable cause statements, and I remember—

Q. I'm sorry. If we go back, you pulled the file from the Juvenile and Domestic Relations Court?

A. No. I pulled it out of my dead files in November 30th of last year and reread the probable cause statement because I recall that we had a defense, I thought, to the concealed weapon.

And the defense was that the officers had no probable cause to have gotten him out of his car and [99] seized him, and therefore, anything after that would have gone down the tubes, in my opinion.

Q. So you had enough of a recollection of the case to remember that there was a Motion to Suppress that you were going to present in the case?

A. I recall that—until I reread the probable cause statement, I did not recall the exact facts. I recall that I thought that there was a defense to it, and I recall—when I talked to you, I recalled that I thought there was a defense to it, that they had something do with the police's probable cause. But the exact sequence of events or what was in the probable cause statement, I didn't recall until I reread it.

Q. At what point after you were appointed to the Mickens case did you realize that the victim was Timothy Hall, a client of yours?

A. I'm not sure. I'm sure it would have occurred rather rapidly after I read the warrant and had a chance to see the Commonwealth's Attorney's file on a cursory basis.

Q. Did you ever go back to the Newport News Juvenile and Domestic Relations file and review that file?

A. No.

Q. Did you know that he may have had—well, did you [100] know he had a Hampton social worker?

A. No.

THE COURT: He had a what?

MR. WAGNER: A Hampton social worker. A social worker from Hampton.

THE COURT: He had a Hampton social worker?

MR. WAGNER: He was being supervised by a social worker from Hampton.

A. No.



BY MR. WAGNER:

Q. Do you recall any notations in your file about a social worker from Hampton, your file of Timothy Hall?

A. Oh, my file of Timothy Hall? No, not—you'll object, but I don't recall anything—I don't even recall the interview with Mr. Hall. The only thing I can go by would be the notes I would have from that interview with Mr. Hall.

Q. Well, if you could just answer my question.

A. No.

Q. Do you recall a Hampton social worker, a reference to a Hampton social worker in the file?

A. In which file?

Q. Timothy Hall's file?

THE COURT: In Mr. Saunders file?

Q. In your file.

[101] A. No.

Hold it now. Are you talking about Timothy—my file on Timothy Hall, or are you talking about the extensive file on the Walter Mickens case?

Q. All I'm talking about is your file on Timothy Hall.

A. No.

Q. Now, when you started work on the Mickens case, did you ever seek the advice of a more experienced capital attorney in preparing the case?

A. No.

Q. So even though you had never selected a death-qualified jury, you didn't seek out the help of someone else to get maybe some insight on how to go about selecting a death-qualified jury?

A. No, I didn't.

Q. Even though you never had done a sentencing phase in a capital case, you never sought out the advice of another attorney to help you prepare the sentencing phase of this case?

A. No.

Q. Did you ever speak to anyone with the Virginia Capital Representation Resource Center?

THE COURT: You mean ever?

Q. Excuse me. About preparing for the Mickens trial.

[102] A. No, I don't believe I did.

Q. Now, do you consider it to be prestigious or an honor to get appointed to a capital case?

A. Not in my personal opinion.

Q. Would you agree, though, it's more lucrative than other cases.

A. Under certain circumstances, yes.

Q. What circumstances is it not more lucrative?

A. Well, if your judge doesn't—

Q. I'm sorry? Let me—

A. Do you want me to answer that question?

Q. Let me refine the question a little bit. Other court-appointed lists.

A. Well, you make more money than you do on other court-appointed cases.

Q. Do you recall how much you made in the Mickens case?

A. I think it was about—

THE COURT: Wait a minute. You mean where?

MR. WAGNER: I will start with—

THE COURT: At the trial or what?

Q. The initial trial, how much did you make through the preliminary hearing and the trial of the Mickens case, the investigation, preliminary hearing, trial?

A. I think it was 9 to $10,000.

[103] Q. And how much did you make on appeal, do you recall?

A. Which one?



Q. Well, let's start with the first appeal.

A. I think there was about $1200. I don't recall exact figures.

Q. The hourly fee on appeal, do you recall how much that was?

A. Whatever the State Supreme Court decided to pay me, and that's exactly what they did.

Q. There's no caps on the appeals fees?

A. I have no idea how the State Supreme Court awards fees. I just take what they gave me.

Q. How many capital cases have you been appointed to since the Mickens case?

A. Three.

Q. How much have you earned in those cases?

MR. HARRIS: Your Honor, I have to question the relevance of any of this.

THE COURT: Yeah, me too. What relevance is it of what he earned subsequently?

MR. WAGNER: Well, because I think by virtue of having handled the Mickens case, it allowed him to be qualified to handle additional capital cases. So there was some incentive for keeping the Mickens case.

[104] THE COURT: Well, that may be true, but why don't you ask him directly whether or not he thought that the Mickens case might lead to future appointments in other capital cases?

MR. WAGNER: I will ask that question.

BY MR. WAGNER:

Q. Do you feel that your appointment in the Mickens case might lead to appointments in other capital cases?

A. No, no. And I was hoping it never would happen again.

Q. You were hoping what would never happen?

A. I would ever be appointed to another capital case.

Q. Did you ever inform a judge that you wouldn't want to be appointed to any additional capital cases?

A. Well, if a judge asked me if I would take a particular case, I usually take the case whether I like to handle that particular kind of case or not. Unfortunately, of the—I said three. I shouldn' say three. There were only two.

THE COURT: Subsequent cases?

THE WITNESS: Subsequent capital cases. I misspoke, Your Honor. The second one I was not asked. I was appointed from the Bench when another attorney withrew, and the last one I was asked by lead counsel [105] to come in at the tail end of it. Since I knew lead counsel and I knew he was a very competent attorney, I agreed to do so. But no, I'm not seeking capital cases.

BY MR. WAGNER:

Q. You never mentioned the fact that you represented Mr. Hall in criminal cases at the time of his death to Mr. Mickens, did you?

A. Not that I recall, but I don't recall not telling him.

Q. Mr. Keeling was your co-counsel, right?

A. That's correct.

Q. You have no specific recollection of mentioning this to Mr. Keeling either, do you?

A. No, I have no specific recollection of that.

Q. But you told Mr. Keeling after reading the petition that you had mentioned this fact of representation to him?

A. No, I don't believe I said that. I said I thought everybody knew it.

Q. That he probably knew it?

A. I said I thought everybody knew it.

Q. You thought everybody knew about your representation of Hall?



A. I assumed because of course this is 1998. I don't [106] recall whether I told Warren or did not tell Warren. If Warren said I did not tell him, then I did not tell him.

Q. But you told Warren that you did tell him, right?

A. No, I did not tell him that I did tell him.

THE COURT: Excuse me, Mr. Saunders.

THE WITNESS: Yes, sir.

THE COURT: I think the problem is that you need to put a finer point on the particular time in which you're asking him the question.

MR. WAGNER: I will.

Q. You discussed the petition with Mr. Keeling soon after you received it, didn't you?

A. We mentioned the fact that a petition had been filed.

Q. And you had a copy of the petition?

A. I believe so.

Q. And you shared that petition with Mr. Keeling?

A. I assume Mr. Keeling got his own copy. I don't recall giving him a copy or sitting down and discussing the facts in the petition.

Q. You never remembered discussing the petition with Mr. Keeling?

A. I'm not saying I did or didn't. What I'm saying to you is that I'd see Warren in the courthouse, and, [107] you know, we mentioned that the petition had been filed. To tell you the truth, I don't really think I reviewed your petition because I got a little upset at you, sir, when you called me on the phone and hit me with a conflict of interest which, in my opinion, is saying that I was unethical.

Therefore, I have tried to avoid reading the material that the Attorney General sent me, the material that you had filed because I don't want to be upset and have that color anything I have to say. So I don't recall sitting down with Warren and going over the petition. I don't think that ever occurred. I

don't really recall even reading your petition to anything—to any extent at all.

Q. After receiving the petition, do you recall telling Mr. Keeling that you had told him about your representation of Hall at the time you were representing Mickens?

A. No, I don't recall saying anything of that nature to Warren.

Q. You have no clear recollection of mentioning to anyone at the time you represented Mickens that you had also previously represented Hall?

A. That's correct.

Q. Is that true? You kept your representation of [108] Hall a secret, didn't you?

A. No, I didn't set out to keep anything a secret. It was not, in my opinion, an issue. It never even occurred to me until you hit me with it on the phone.

THE COURT: Just so the record is clear, when did that happen?

THE WITNESS: 1998.

BY MR. WAGNER:

Q. Was it sometime in perhaps May of 1998?

A. It may have been, sir. I don't recall the time when you called me.

Q. Did you feel that if you revealed this to anyone that you may have to withdraw from the case?

A. When?

THE COURT: Did you in 1992? Is that what you mean?

MR. WAGNER: I'm sorry, yes.

THE COURT: Let's get the question straight.

Q. In 1992 when you accepted the appointment of the case, when you realized you were also representing Mr. Hall, did you feel like you would have to withdraw from the case if anyone found out that you represented Mr. Hall?



A. No, I didn't. Sir, as I said, I didn't see a conflict. I still do not see a conflict.

[109] THE COURT: Would you speak up, please?

A. I'm sorry. I did not see a conflict in 1992, in 1993. I still do not see a conflict to this day.

* * * *

BY MR. WAGNER:

Q. Do you see anything unethical?

THE COURT: Just a minute.

MR. HARRIS: Judge, if it's anything other than conflict, it's irrelevant, and we don't need to get into it.

[110] THE COURT: Overruled.

Q. Do you see anything unethical with having represented Hall and three days later taking on the representation of Mickens?

A. No, sir, I do not.

Q. No appearance of impropriety?

THE COURT: Why don't you ask him a complete question?

Q. You don't see this as an appearance of impropriety, the representation of Hall and then taking on the representation of Mickens?

MR. HARRIS: Judge, again, I have to object. We are not having an ethics hearing on this man. There's a very specific issue this Court is hearing and it's not a Bar complaint and these questions have no relevance to the issue of a conflict of interest.

THE COURT: I thought appearance of impropriety was a conflict?

MR. HARRIS: As an ethical consideration it might be, but this is not a State Bar Committee hearing an ethics complaint.

This a court hearing an ineffective assistance of counsel complaint which is not guided by any canons of ethics by the Bar Association.

THE COURT: Overruled. Ask the question [111] again. And when you said "ethical," he was bound by the Virginia Rules of Ethics, and there are, in fact, different rules. So include in your question Virginia rules.

MR. WAGNER: I understand.

BY MR. WAGNER:

Q. But the question I asked though, was whether or not you viewed this representation of Hall—or representation of Mickens after having represented Hall as an appearance of impropriety. That's the question.

A. I have to put it back to you again. I did not see a conflict. Therefore, I did not see any appearance of a conflict. Therefore, I did not see any—to answer your question, no, I didn't see anything.

Q. If you saw no problem, no ethical violation or appearance of impropriety with your representation of Mickens after having represented Hall, why didn't you discuss it with Mr. Keeling?

A. It's very simple. I don't know whether I did or did not. I'm saying that if he says I did not, I did not. But it was not an issue in the case. We are representing this man on a number of charges, a great number of charges, and that wasn't an issue in the case. That's all I can tell you.

[112] Q. Mr. Keeling was handling the sentencing phase of this case, was he not?

A. That's right, yes.

Q. In investigating the sentencing phase of a capital case, isn't it important to know as much as you can about not only the defendant but also the victim?

A. In certain instances that may be true. In this particular case I think investigating the victim and trying to use evidence about the victim would have been self defeating.



Q. We're not talking about now—well, let's talk about investigations. Just because you investigate things about the victim doesn't mean you present it at trial, does it? Please answer that question.

A. No, it doesn't necessarily mean you present things at trial.

Q. When you prepare for a capital case, you want to collect as much information as you can, don't you?

A. Usually I would assume so, yes.

Q. And then once you have all that information, you can assess whether or not you should use that information at trial; isn't that correct?

A. Yes, that's absolutely true.

Q. So you are going to be hampered if you don't have all the information that's available to you—isn't that [113] right—as a lawyer on a capital case?

A. I assume so. I don't know exactly where you're going with this. I do know what we had.

THE COURT: Wait a minute. "You assume so" is your answer?

THE WITNESS: I assume so, yes.

BY MR. WAGNER:

Q. Now, in your estimation what percentage of the workload in the case did you take on, and what percentage did Mr. Keeling take on?

A. I can just give you a figure. I'd just say 90 percent and 10 percent, but whether or not that's the actual figure, I can't . . .

THE COURT: The 90 percent would be for whom?

THE WITNESS: For me.

Q. Now, on May 22nd of 1998, I came to your office and I met with you; isn't that correct?

A. I don't recall the exact date. I know you came to my office.

Q. We discussed your representation of Mr. Mickens and Mr. Hall; is that right?

A. I believe we did, yes.

Q. I told you I was representing Mr. Mickens?

A. Correct.

[114] Q. Is that right? And I told you I was trying to save his life; isn't that right?

A. I don't know whether you used those words or not. I know what your job is supposed to be, yes.

Q. You understood what my job was, right?

A. Yeah.

Q. And you agreed to talk to me about the case, right?

A. That's correct.

Q. You told me at that conference that you had told Judge Foster, the judge who appointed you to the Mickens case, of your representation of Hall; is that right?

A. I did say that to you, yes.

Q. You said you discussed your appointment—you said you discussed your representation of Hall with Judge Foster after you had been appointed to the Mickens case; is that right?

A. I believe that's—I don't know exactly how far I went, but I think I told you that I had discussed it with her and there wasn't any conflict. But you're going to ask the question. So go ahead and ask it.

THE COURT: I need to understand your answer. At some point in time you discussed with Judge who? Foster?

[115] THE WITNESS: Your Honor, the question—

MR. WAGNER: Judge, the question was, did he tell me that he discussed it with Judge Foster. That's the question. Did he tell me that he discussed it with her.

THE COURT: All right. And the answer to that is yes?

THE WITNESS: I did tell him that, yes, Your Honor.



THE COURT: And you told him that you discussed with Judge Foster the fact that you had represented Hall, and you told her that after you had been appointed to represent Mickens; is that the statement?

THE WITNESS: I can't tell you the exact words, Your Honor. I did say to him that I discussed it with her, and he's got another follow-up question on that.

THE COURT: Well, I'm sure he does.

THE WITNESS: I'm trying to be straightforward.

BY MR. WAGNER:

Q. Isn't it true that you told me that she said she didn't have any problem with your representation of Mickens?

[116] A. No, sir, I don't recall saying that.

THE COURT: Wait a minute. Let him finish the question before you answer it.

Q. Is it true that you told me that she told you that she didn't have any problem with your representing Mickens after you had represented Hall?

A. No, sir, I don't believe I used those words. I think the answer was that there was no conflict.

THE COURT: She said that? You told Mr. Wagner that she said there was no conflict, or you said there was no conflict?

THE WITNESS: I don't recall saying that she said anything to me. What I recall was that I told Mr. Wagner that I had talked to her about it and that there was no conflict.

Q. Mr. Saunders, you never spoke with Judge Foster, did you?

A. No, I didn't. Not to my present recollection.

Q. You never told her about your representation of Hall after your appointment to Mickens; is that right?

A. That's correct, according to what I recall now.

Q. What you told me was not the truth; is that right?

A. At the time I thought it was, Mr. Wagner.

Q. Mr. Saunders, you knew at that time I was investigating Mr. Mickens case; is that right?

[117] A. Yes, Mr. Wagner.

Q. But you never tried to call me to correct this misinformation you gave me, did you?

A. No, I don't think I did. Because I don't know whether I had your phone number or not either. I'm not saying I didn't. I don't know whether I did or not.

Q. Did you try to reach me?

A. I don't believe I did, Mr. Wagner.

Q. At that meeting on May 22nd, you also told me that you were never aware of any information that Timothy Hall was a male prostitute; is that right?

A. I don't have any information that Mr. Hall was a male prostitute, no.

THE COURT: Wait a minute. Let me get this straight. You're asking the question, though, Mr. Saunders, did you tell him on May 22nd that you did not have any information?

THE WITNESS: That's what I told him.

THE COURT: That he was a male prostitute. That's what you told him?

THE WITNESS: Yes, sir, that's what I told him.

BY MR. WAGNER:

Q. And you also said that you had no information [118] about Mr. Hall being a homosexual; is that right?

A. That's correct.

Q. You said that you had never seen the newspaper article with the Alysha Thrash comment which I showed you at that meeting; is that correct?

A. I don't recall you showing me anything, Mr. Wagner. I don't think I told you that I had never seen it. I think I told you that I hadn't read it.



Q. Let me hand you what's been already entered into evidence as Exhibit 1 to our petition.

Do you recall me showing you that article when I came to see you in May of 1998?

A. No, I do not.

Q. Now, isn't it true that after I left your office you somehow recalled that you had been made aware of rumors of Timothy Hall's homosexuality?

A. When you brought it up, yes. I don't know where it came from. I don't know whether it's in the Commonwealth's Attorney's file, but yes, I did have some slight recollection of that.

Q. But you didn't tell me that when I asked you about it; is that right?

A. At the time I gave you the honest answer. I did not recall that. I did not have any of that information in my head at that time.

[119] Q. Then when you recalled that you did have that information, you never contacted me, did you?

A. No, I didn't, Mr. Wagner.

Q. Do you understand how important this process is to Mickens?

MR. HARRIS: Your Honor, I've got to object to this. He's testifying now. That's not a question.

THE COURT: Are you saying that's argumentative?

MR. HARRIS: Yes, sir.

THE COURT: Sustained.

BY MR. WAGNER:

Q. Let's talk a little bit about the investigation of the case. You reviewed the Commonwealth's file; is that right?

A. That's correct.

Q. After reviewing the Commonwealth's file, you never spoke to a single Commonwealth's witness prior to trial; is that right?

A. That's correct.

Q. Never investigated the information you found in the Commonwealth's file with any of the witnesses that were listed?

A. I take that back. I talked to the DNA expert.

THE COURT: What now?

[120] THE WITNESS: DNA expert, Your Honor. I may have talked to the medical examiner. I don't recall whether I did or not, and I may have talked to both of the DNA experts.

BY MR. WAGNER:

Q. All right. I'm going to hand you some files that I will refer to as Defense Exhibit 2A. This is—we will call them notes on Alysha Thrash.

MR. WAGNER: I'd like to hand that to the witness.

Q. Do you recognize that particular piece of paper?

A. It's a yellow pad. It looks like my handwriting.

Q. Is that your handwriting?

A. It looks like my handwriting.

Q. Are those notes you took of the Commonwealth's files?

A. I haven't seen any of these things in years.

Q. But that is your handwriting?

A. It appears to be my handwriting, yes.

Q. All right. And on the top of this page, it says, "Alysha Thrash," right?

A. Uh-huh.

Q. And it appears to be—well, her address and phone number; is that right?

A. That's correct.

[121] Q. And there appear to be statements that she made to the police officer, would that be correct?

A. I don't know who she—I don't have the rest of the sheet. So I don't know exactly who the statements were made to. They appear to be statements made.



Q. I see Detective Price here on the top. Do you know Detective Price?

A. There's a Detective Price in the Newport News Police Department.

Q. Did you ever talk to Detective Price about these statements?

A. To Price himself or herself? I don't recall I talking to her or him.

Q. Did you ever contact Alysha Trash about these statements?

A. At some point in time, I believe I tried to call her.

Q. Did you ever talk to her?

A. I believe I may have talked to her, but she wasn't a Commonwealth witness.

Q. Wait a minute. Are you saying now that you did talk to Alysha Thrash?

A. I may have. I don't recall. I know I tried to call her. At what time frame it was, I don't know, but you're asking me if I talked to Commonwealth's [122] witnesses. No, I didn't talk to the Commonwealth's witnesses.

Q. Did you ever ask the court to appoint an investigator to assist you?

A. No.

Q. Did you ever ask the Court to appoint any experts to assist you, aside from the mental health experts to do the competency evaluation?

A. No, I did not, no.

* * * *

BY THE COURT

[124] Before you get into that, I've got Petitioner's Exhibit 2A, and I would like for you to read into the record, since this is your notes, the third substantive entry beginning with, quote, everything. I want to make sure I understand what that says.

THE WITNESS: "Everything got real messed up because when we went to the wake, this girl named [125] Stephanie said Timmy had called her Saturday night and all scared and

nervous and talked about this prostitute was harassing him, saying all this kind of stuff, that he was harassing him over something or other.

"And then she told him to come pick her up and he said that he was at the end of 29th Street, and that's where he said by the construction office. That's where he was at, and she said he called her and told her to come pick him up, like that," is what it says.

THE COURT: All right.

BY MR. WAGNER:

Q. Just to follow-up on this, did you ever try to find out who Stephanie was?

A. No. I can't say I did or didn't at this point in time.

* * * *

[126] BY MR. WAGNER:

Q. If you would turn to the third page of this exhibit, can you read at the top line there?

A. The very top line?

Q. Uh-huh.

A. I believe it says, "Usual for Tim to stay gone."

Q. Then if you go down to the middle of the page, there's a reference there, 9:00 p.m., and then following that, I believe that it's nothing much else of use.

Could you please read that and what follows [127] it in that paragraph?

A. After nothing much?

Q. Right.

A. It's says, "Tim had been ducking three guys"—

Q. I'm sorry. There's some noise outside. If you could read the whole line?

THE COURT: The entry for 9:00 p.m., go ahead.

THE WITNESS: Do you want me to read "normal for them to be"?



THE COURT: Yeah, read that whole paragraph, if you would.

A. "Normal for them to be home about 8:30, 9:00 p.m. Nothing much else use except that Tim had been ducking three guys owed money to for about three months. They came to apartment at least once."

BY MR. WAGNER:

Q. And then Charity Flemming, I believe it is, there's a reference there about three lines down after her address and phone number. It says "supposedly talked."

If you could read from that to the end of the paragraph, please?

A. To the end of the paragraph. "Supposedly talked to Tim on Sunday around 6:00, 7:00. Wanted her or [128] Stephanie, ex-girlfriend, to pick him up at 29th Street either on corner or at Basic because of problems he was having with a girl he picked up on Washington Avenue a couple of days before. This could just be bull or could have day wrong."

Q. Did you ever try to speak with Charity Flemming?

A. I don't believe so.

Q. Did you ever try to speak with Bernard Gordon?

A. I intended to, but I believe he died on me.

Q. Let's move on.

THE COURT: When did he die?

THE WITNESS: Well, Judge, that's just it. I'm not exactly sure. I know I intended to talk to him, and he died on me. But I'm not sure whether he died on me before the preliminary hearing or subsequent to the preliminary hearing.

THE COURT: But he died before the trial?

THE WITNESS: Yeah, he was dead before the trial, yes, Your Honor.

BY MR. WAGNER:

Q. Isn't it true that you reviewed these Commonwealth files almost as soon as you got the appointment to the case?

A. I did a cursory review of this file, but to say that I reviewed the Commonwealth's file almost [129] immediately—because it was extensive. What you've got here is nowhere near the two boxes that Ben Patrick picked up.

THE COURT: Nowhere near the two boxes that what?

THE WITNESS: I turned all this information over to the State's habeas attorney, Your Honor. It's all in two boxes.

THE COURT: Yeah. But I think you were talking about the Commonwealth's Attorney's files.

THE WITNESS: That was an extensive file, Your Honor, very extensive. It had two or three major booklets.

THE COURT: You're holding up your hand about, what, 12, 8, 9 to 10 inches above the top of the table?

THE WITNESS: They were very extensive. I can't give you the exact length, but they were very lengthy. And I reviewed it over a number of days, weeks, months.

BY MR. WAGNER:

Q. There were some potentially exculpatory information in these files, wasn't there?

A. I'm not sure how you mean that. My opinion. . .

THE COURT: Do you recall whether there was [130] information?

THE WITNESS: I don't recall, Your Honor.

Q. What I've shown you here, wouldn't you agree that some of this, if followed up on, could provide exculpating material to present at trial on behalf of Mr. Mickens?

A. I'm not sure about that either.



Q. But you did no investigation to follow up on these notes that you took of the Commonwealth's files?

A. I didn't talk to these particular individuals, no.

THE COURT: I think the question was, did you do any other investigation of it. You already testified that you didn't talk to them.

Did you do any other investigation to follow up on the statements in the Commonwealth's files?

THE WITNESS: Well, on these particular, I can say I didn't talk to these individuals. As I said before, I believe I talked—I know I talked to at least the DNA expert out in California. I believe I talked to Ms. Vanty, who was the DNA expert from the state lab.

In order to try and negate the scientific evidence that was coming in, I did research of my own to be prepared to examine these people. We did a suppression hearing to try and get Mr. Mickens' [131] statements out.

BY MR. WAGNER:

Q. In your conferences with Walter Mickens, he told you he didn't do this crime; isn't that right?

A. That was his story, yes.

Q. And there were leads, at least from the files that I've read into the record or you've read into the record now, pointing to several other possible suspects, weren't there?

A. If you say so, sir. I don't see any suspects here that fit this situation.

Q. There's information pointing to Mr. Hall's involvement with a prostitute; is that right?

A. That's what this statement from somebody says.

Q. You didn't follow up with that, did you?

A. I don't recall this thing at all. But if you're asking me if under the circumstances, the way this murder went down I was going to investigate where he was with a prostitute which I assume was—since it says prostitute is a female, it didn't make any sense.

Now, that's my answer to you today in 1998. I had no idea of what my thinking was in '92 or '93, and I've been through this thing with all these years and everything is other things I learned over all six years and when we went back for the resentencing, the [132] things that I had picked up through conversations with the police officers over those years and the conversations with the Commonwealth's Attorney.

These are all meshed together now and I can tell you that if —reading these two statements together, we got a girl over here and you're saying a prostitute over here and I've got a dead body stabbed 146 times with his pants down and bruises of some nature on his rear end, you're telling me I was supposed to investigate a woman?

Q. Did the prosecutor ever mention lubricant in the trial?

A. I believe it was in one of the scientific parts of their file.

Q. Was it ever mentioned at trial?

A. I have no idea whether it was actually ever mentioned at trial because I don't have the transcripts any more. I've turned all that stuff over to the State habeas.

Q. Did you ever share your notes that you took in the Commonwealth's files with Mr. Keeling?

A. I don't know whether he ever looked at them or not. They were for him to review. I can't say I didn't, and I can't say I did.

Q. Did you collect newspaper articles for this case?

[133] A. Subsequent to my appointment and I did go back and have some run off of a fiche—newspapers have—

Q. Microfiche?

A. Microfiche, that's it. Thank you.

Q. You had collected these articles because you were preparing venue motions; isn't that right?

A. If we had any problems, yes, that's the reason I was collecting them.



Q. But this Alysha Thrash article, the article I handed to you, that was not part of those articles that you had collected? It was not one of the articles that you had collected?

A. I don't recall that. It may have come off of microfiche. I don't recall whether I had that article at all.

Q. Did you ever speak with Mr. Keeling about a consent defense?

A. No. We weren't provided any information that led us to discuss a consent defense.

Q. Did Mr. Keeling ever tell you about a woman in his church who he spoke to that said she knew Timothy Hall?

A. I do believe he said that there were some members of his church that knew Hall and that they were helping him out every once in a while.

[134] Q. Helping out Mr. Hall?

A. That's the way I recall.

Q. Did you ever share with Mr. Keeling the newspaper clippings that you had collected?

A. The entire file was open to Warren at any time he wanted to look at it. My understanding was that he was collecting newspaper articles at the same time. The file was there. We were co-counsel. He could look at it, do anything he wanted to.

Q. My question to you is—well, let me ask another question. Do you recall discussing any of the newspaper articles with Mr. Keeling?

A. No, I don't recall.

Q. So you don't specifically recall having discussed the Alysha Thrash newspaper clipping with Mr. Keeling?

A. Sir, I don't recall discussing a newspaper article with Mr. Keeling at all.

Q. Let's talk a little bit about the consent defense. Is it your position that there was no evidence of consent?

A. I had no information that would lead me to look at the evidence that was presented for a consent defense.

Q. Is it your position that you could not lay a foundation for consent?

A. It's my position today that if you wanted to raise [135] that consent defense—

THE COURT: Excuse me, Mr. Saunders. I think he was asking—let's get the time on it, Mr. Wagner. Are you talking about 1992?

MR. WAGNER: I'm sorry.

BY MR. WAGNER:

Q. We're talking about in preparation for the trial, at the time of the trial back in 1992, 1993.

Was it your position then that you could not lay a foundation for consent?

A. Sir, since I had no information that led me to think there was a consent defense, I don't believe I even thought of it.

THE COURT: You didn't think of a consent defense, is that what you're saying?

THE WITNESS: That's what I'm saying, Your Honor. When I say I had no information, I'm talking about from my client, Mr. Mickens.

Q. Did you need evidence from your client in order to present a consent defense?

A. Sir, if I'm told one set of factors and I don't necessarily grasp everything that might be over here, when I'm working on listening to what my client has told me, I didn't even think of a consent defense. Do you understand?

[136] Q. My question to you is—

THE COURT: I think the answer is, he didn't think of a consent defense, period.

* * * *



BY MR. WAGNER:

[138] Q. Referencing Exhibit 2, which near the top says, "Discussions with FBI Agents McPortland and Elter," did you have conversations with FBI Agents McPortland and Elter?

A. No.

Q. So this was copied from the Commonwealth's file?

A. That's correct.

[139] Q. If you'll look to No. 2, there's several numbers there underneath the discussions with FBI agents reference.

Could you read No. 2 there?

A. "If victims had no defense wounds, then either they possibly knew the killer or didn't feel threatened when approached, when approach was made by the attacker."

Q. So wouldn't defense wounds, then, or the absence of defense wounds indicate consent?

THE COURT: Are you asking him if he thought that then or if he thinks it now?

MR. WAGNER: Let me ask him, Judge.

Q. Did you feel then that the absence of defense wounds would have established consent?

A. No, sir.

MR. HARRIS: Your Honor, if we can ask, consent to what?

MR. WAGNER: Consent to the assault.

THE COURT: Sustained.

Q. This is referencing the alleged sexual assault.

A. Considering that I didn't even—

THE COURT: I think the simple answer is no, isn't it?

THE WITNESS: Yes, sir. No.

[140] THE COURT: Okay.

Q. Do you recall having reviewed these notes about the FBI agents' statements?

THE COURT: Ever?

Q. Ever. Prior to today.

A. Prior to today? I made these notes in 1992, and I read this. This is a partial FBI profile, is what it was. Its value to either the defense or the prosecution, if any, did not occur to me.

Q. Does it occur to you now, what the value might be?

THE COURT: That doesn't mean a whole lot, now does it?

MR. WAGNER: All right.

Q. Were you aware of the fact or do you agree that the area near where the body was found is a high crime area?

A. Do I agree that it's a high crime area?

Q. At the time of the offense, that the area near where the body was found was a high crime area.

MR. HARRIS: Your Honor, again, I have to ask why this is relevant to anything. We have evidence here that the young man lived there. Whether it was a high crime area or not, it's irrelevant.

MR. WAGNER: Your Honor, I believe that if we identify this as a high crime area and then [141] identify it as an area where there's prostitution, then it can be helpful—

THE COURT: Overruled.

MR. WAGNER: —in laying a foundation for consent.

THE COURT: Overruled.

BY MR. WAGNER:

Q. Do you agree?

A. No, I do not agree.

Q. All right. Did you discuss whether this was a high crime area with Mr. Keeling?



THE COURT: Where? Where he lived or where the offense occurred?

Q. Near where the offense occurred at the time you were preparing for trial.

A. I don't recall discussing whether it was a high crime area or not. I happen to know—

THE COURT: Mr. Saunders, now you need to kind of cool down a little bit.

THE WITNESS: All right. Yes, sir.

THE COURT: I know that you're frustrated, but we're trying to have an examination. So just relax, and give him your answers as best you can.

You don't remember?

THE WITNESS: I don't recall.

[142] BY MR. WAGNER:

Q. Do you recall that there was prostitution in the area at the time of the offense near where the body was found?

A. I'm not aware of that.

Q. Didn't you testify at deposition that approximately five or six blocks away from where the offense occurred you're familiar that—or you're aware of prostitution going on there?

A. That's five or six blocks away. That's where the police were launching their sting operations. At that particular point in time is where my understanding the prostitution would be taking place. That has nothing to do with the high-rise and residential area in which this boy lived. And I had no knowledge that there was any prostitution going on in that area.

Q. You were aware of allegations of Hall's homosexuality, were you not?

A. No.

Q. You were aware of rumors of Hall's prostitution, were you not?

A. No.

Q. Never discussed that with Mr. Keeling?

A. Not that I recall. Now, I mean, my personal recall, all right, I do not recall discussing that [143] with Warren. To be honest with you, he said to me—now, I don't want to—that he had said something about that to me, but I do not recall that conversation at all.

Q. Is it true that there was no evidence presented by the Commonwealth that Mr. Hall was forced to that location?

A. No evidence presented by the—that's true, yes.

Q. So that there was evidence that he consented to at least go to that location?

A. No, sir, there was no evidence of that.

Q. Did you feel that this was something you could argue at trial, that he consented to go to the location?

A. I don't know what you mean by "he consented to go to the location" in the first place, sir.

THE COURT: I think maybe a better question would be, did you consider arguing at trial that because there was no evidence that he had been forced, Mr. Hall had been forced to the site where he was found, that he went there voluntarily?

Did you consider arguing that? Isn't that what you want to know?

MR. WAGNER: That's fine, Judge, yes.

A. I believe that I threw that in, that there was no [144] evidence that he had been forced, but to say that I argued that he had voluntarily gone, I'm not sure how he got there. The problem is—I tried to tell you that problem is that everything is meshed together, conversations from the police department that he liked to go sit there and watch the river, that they had found that out from his girlfriend. All I have is that he was found there. I have no—



THE COURT: I think the question, though, Mr. Saunders, did you consider making the argument that because there was no evidence that he was forcibly taken to that location, that he voluntarily went there.

Did you consider making that argument?

THE WITNESS: If you mean voluntarily went with Mr. Mickens?

THE COURT: Went with anybody.

THE WITNESS: I think I did consider it as an argument of lack of proof of force.

BY MR. WAGNER:

Q. Did you use that argument?

A. I used a lot of things in the argument. You've handed me at the depositions a part of it where I said that there was—that they should consider that there was no proof that there was force, there's no proof [145] how either of these people got together and that the Commonwealth didn't want them to consider those kind of things. I do believe that was part of the argument, but it was closing argument.

THE COURT: Is there anything else now, Mr. Wagner? You're getting kind of far afield.

MR. WAGNER: Okay. I'll move on, Judge.

BY MR. WAGNER:

Q. You knew from your representation of Mr. Hall that he was charged with a concealed weapon charge; is that correct?

A. Yes.

Q. And you knew from your representation of Hall that he was found in a high crime area; is that right?

A. I actually—to tell you the truth, I don't know where it was. I thought it was down where he lived.

Q. Okay. Do you remember the probable cause statement in the juvenile record of Mr. Hall, about the concealed weapon charge?

A. I've reviewed it, but the exact wording of it, I can't tell you.

Q. Do you remember the attachment that the police officer—let me present, if I could, Mr. Saunders, Petitioner's Exhibit 3.

MR. WAGNER: I believe this is a part of the [146] record, Judge, what's been subpoenaed from the Newport News Juvenile and Domestic Relations Court.

THE COURT: So what part of the record is it?

MR. WAGNER: It's the juvenile record of Mr. Hall.

THE COURT: Does it have a number?

MR. WAGNER: I don't believe we've assigned a number to it, Judge, for purposes of the many pleadings that we've filed.

THE COURT: All right.

BY MR. WAGNER:

Q. Do you recall reading that probable cause statement from the Hall case?

A. Yes.

Q. And do you recall that the police officer presented in that probable cause statement that Mr. Hall was arrested in a high crime area?

A. That's what it says in the probable cause statement. It says, "Officers were in the area of 27th Street and Marshall Avenue, which has been identified as a high crime area."

* * * *

[151] Q. Did you talk with Mr. Mickens about presenting any evidence of consent?



A. I didn't talk to Mr. Mickens. I just outlined to you that Warren had relatives in the area and he would go up to the prison and visit his relatives and talk to Mr. Mickens. It was—that part of the second case was basically Warren's, but to be short about it, no, I didn't.

Q. Did you know that there was a statutory mitigator that if you presented evidence that the victim consented to the activity that led to his death, then the jury could consider that in imposing the death sentence?

A. I'm aware of that.

Q. Did you consider after—did you consider presenting consent evidence based on that statutory mitigator?

A. Consent never even entered my mind based on what we had been told. Now, if you wish for me to explain to you why I would not think that that would be a good thing to do in the second phase—I mean, the second sentencing hearing, I'll be glad to do that.

* * * *

[152] Q. Do you recall reviewing a presentence report that was presented to the judge in 1996 after the jury sentencing?

A. To be technically correct, it's a post-sentencing report, and I had reviewed it, yes.

MR. WAGNER: I believe that's in evidence, and do you have—

THE COURT: Exhibit 1.

MR. WAGNER: Exhibit 1.

THE COURT: Petitioner's Exhibit 1.

MR. WAGNER: I believe there should be a copy.

Q. Did you review that with Mr. Mickens?

A. Sure. We went over it. I don't recall right offhand, but I always go over these things with the client. So I'm assuming that we did.

Q. Did you present the argument at that sentencing to the judge?

A. Which argument? You mean—yes, I argued the sentencing at that time.

Q. Okay. At that time, if you'll look to the second to the last page of the exhibit, do you see there the statements from Timothy Hall's mother?

[153] A. Yes.

Q. And those statements say a lot of favorable things about her relationship with her son; is that right?

A. That's correct.

Q. You had information that there was some not so favorable things between Ms. Hall and her son, right?

A. Based on—

THE COURT: Based on your representation of Mr. Hall, his question is: Did you have information that Mr. Hall did not have a favorable, good relationship with his mother?

A. Not based on any information I obtained from Mr. Hall.

Q. Based on the fact that you—

THE COURT: Wait a minute. Wasn't he charged with assaulting his mother?

THE WITNESS: That's correct, Your Honor.

THE COURT: Why wasn't that information presented at the sentencing during cross-examination of this woman when she testified at the sentencing?

THE WITNESS: She didn't testify, Your Honor.

THE COURT: She didn't?

THE WITNESS: She did not.

THE COURT: Okay.



[154] BY MR. WAGNER:

Q. Did you bring this—

THE COURT: I mean, why wasn't it brought to the judge's attention?

BY MR. WAGNER:

Q. Right. Why wasn't it brought to the judge's attention?

A. The issues on this—that's a victim impact statement. The issue is not the victim impact statement or the mother, but whether or not there was good cause for that judge to set aside the death sentence imposed by the jury.

Q. My question to you is simply did you present any evidence to the judge, any argument to the judge, that would impact on the statement provided by Mr. Hall's mother?

A. I don't believe so.

THE COURT: Well, let me ask you this: During your representation of Mr. Hall, did you obtain information, without telling me what it was, did you obtain information that bore upon the relationship between Mr. Hall and his mother?

THE WITNESS: No, sir.

THE COURT: I don't know what it was.

A. The best of my recollection I did not obtain any [155] information as to the relationship of him to his mother as to a personal relationship or how they felt.

THE COURT: Did you talk to him about why he had assaulted his mother or whether he had assaulted his mother? Without giving me the answer, did you talk to him about those problems?

THE WITNESS: I had reason to believe she would not be there.

THE COURT: No. When you interviewed Mr. Hall, did you talk to Mr. Hall about why he had assaulted his mother

that gave the charge that you were defending on? Just yes or no.

THE WITNESS: Well, I don't recall the conversation with Mr. Hall, and all I can go by is my notes.

THE COURT: Okay.

THE WITNESS: And they do not reflect anything other than—

THE COURT: Other than what?

THE WITNESS: Other than the reason that I had reason to believe she would not be interested in prosecuting the case.

THE COURT: Okay.

BY MR. WAGNER:

Q. You knew that Mr. Hall had been in foster care, [156] did you not, at the time that the offense occurred, at the time of his death?

A. From the petition.

Q. You knew that he had been—you didn't bring this out to the judge at the time of the sentencing, did you?

A. That he had been in foster care, no, sir.

Q. I just want to follow-up with a couple of questions.

Did you ever consider introducing any negative evidence about the victim?

A. At the trial or—

Q. Either trial or at sentencing.

A. No.

Q. Didn't you want to try to minimize the sympathy that the jury had for the victim?

A. I don't know how to honestly answer that particular question. To me Mr. Hall was a demographic situation, which was disastrous as far as Mr. Mickens was concerned. To have then taken that demographic situation and tried to have attacked the victim would, in my opinion, have not only have lead to the exact result we have here, but would have



been disastrous because after having reviewed Mr. Mickens's past criminal convictions, we were aiming more in my [157] opinion at trying to find a juror on that jury that would not impose the death penalty, period. End of quotation. Attacking a 17-year-old white victim who had been stabbed 143 times, and I don't care if he had been guilty of grand larceny, you bring that out in front of a jury in those situations, you're asking to get your client killed. You're not asking that jury to save him or trying to find anybody on that jury who would not vote for the death penalty. You're simply giving them a rope and saying, "Take him out to the nearest tree and hang him."

THE COURT: You mean because of his race?

THE WITNESS: No, not just that.

THE COURT: What do you mean by demographics?

THE WITNESS: Demographics. He's a young boy. He's 17 years of age. He's stabbed 143 times. His pants are missing. We add in there the past record of Mr. Mickens. And I'm going to attack this victim in front of a jury who's going to say whether Mr. Mickens is going to live or die? My opinion is very simply that I could have just handed them a rope and let them go find a tree if I had done that. Either in the guilt phase or the penalty phase because you know once he decided he was going to testify, his [158] record was coming out. And you're dead. You're killed.

BY MR. WAGNER:

Q. Did you ever discuss plea negotiations in this case with Mr. Gwynn?

A. Yes. The first thing out of Howard's mouth was, "No way."

THE COURT: Just so the record is clear, who is Howard?

THE WITNESS: Howard Gwynn is the Commonwealth's Attorney who was the Commonwealth's Attorney in the City of in Newport News.

THE COURT: So he told you, "No way"?

THE WITNESS: "No way."

BY MR. WAGNER:

Q. Did you ever present to him any information that you had that you might be able to present about a consent defense? In other words, did you try to persuade him that he would have trouble proving an attempted forcible sodomy, therefore, you should plead this out as a first degree murder?

A. You've got two different things here. No, I never talked to Howard Gwynn about a consent defense. He would have laughed in my face.

The other part of it is we tried and argued [159] and got the judge to give a first degree murder instruction on whether or not they had proven attempted sodomy. That was given to the jury.

Q. Did Mr. Gwynn or the Commonwealth's Attorney's office at the time that you were representing Mr. Mickens at trial and prior trial, did they know that you represented Tim Hall at the time of his death?

MR. HARRIS: I object. He can't know what the prosecutor knew or didn't know.

MR. WAGNER: Unless they talked about it, Judge.

MR. HARRIS: That's a different question.

THE COURT: That is a different question. Objection is sustained.

Q. Did you talk to Mr. Gwynn about your representation of Hall?

A. Not that I recall.

* * * *

[173] Q. Would you agree that the police and prosecutors in 1992 mapped the area near where Tim Hall's body was found as an area where prostitutes would be prohibited from returning to?



[174] A. I have no knowledge of that. I know they mapped certain areas of the city, but I have no knowledge of that particular area being mapped.

Q. Now, you indicated that you received information that Mr. Hall used to go down to the water and sit there and watch the water, is that right?

A. Today with all of the years in there I recall the police officer telling me he interviewed Mr. Hall's girlfriend, and Mr. Hall used to like to go sit down in that area and look at the river. Now, when that was—was it in '92, '93, '94? Because the police department liked to talk about this case every time they could dig their spurs into me, so I learned a lot of things. But my best recollection is that that conversation was sometime during the '92-93 era.

Q. Did you make any effort to speak with his girlfriend?

A. All I had was the girlfriend. They didn't give me a name.

Q. My question to you was—

A. No.

Q. Plain and simple. Did you make any effort to speak to his girlfriend?

A. No.

* * * *

[182] Q. And did you investigate the information that you obtained from the Commonwealth's files at any time in any manner independent of the police or the prosecutor, and as you say, the DNA evidence that you looked at, and the DNA witnesses you talked to?

THE COURT: I think he's already answered what he did and what investigation he did. And he said he didn't investigate any of the statements or information in the file other than the DNA and perhaps the medical examiner, I believe. Isn't that right, [183] Mr. Saunders ?

THE WITNESS: Yes, sir, that is correct.

MR. WAGNER: All right.

Q. Was it Mr. Mickens' contention that someone else killed Tim Hall?

A. It's Mr. Mickens' contention he didn't do it.

Q. So someone else must have done it, right, according to Mr.—

A. That would have been the logical—

Q. What if any investigation did you do into finding out who else might have committed this crime?

A. None.

MR. WAGNER: Thank you.

THE COURT: Mr. Harris. Cross-examination.

CROSS-EXAMINATION

BY MR. HARRIS:

Q. In regard to a question you were just asked a moment ago by both Mr. Wagner and the Court concerning who else you may have spoken to in investigating the case other than the medical examiner, the DNA experts and the police officers, I have a note that you said you may have spoken or tried to speak to Alysha Thrash?

A. Yes.

[184] Q. Were there other witnesses—

THE COURT: Well, no. Wait a minute. I remember his testimony, what he said about that. Don't you be testifying.

MR. HARRIS: I'm not trying to testify, Your Honor.

BY MR. HARRIS:

Q. Were there other witnesses other than those who you actually spoke to that you attempted to contact and were unsuccessful in contacting if you can recall?

A. I really can't.

THE COURT: But he did say he thought that he attempted to contact Bernard Gordon, but Bernard Gordon died on him before he could talk to him, I believe is what you said.



THE WITNESS: That's the best of my recollection.

THE COURT: But you're not sure?

THE WITNESS: I'm not positive about it.

THE COURT: Okay.

BY MR. HARRIS:

Q. Other than Bernard Gordon, can you recall whether you attempted to call any of these other witnesses and were unable to contact them?

A. I can't recall whether I did or not.

[185] Q. If you could tell me with regard to your working relationship with Mr. Keeling, how did the two of you divide up responsibility for investigating the facts in the case?

A. Well, I was doing the Commonwealth's Attorney's file because I knew it was going to take an extensive amount of time; it was scientific. Now, I don't believe we actually sat down and said you do this and you do that. I knew Warren was doing certain things and I expected that if he found anything, he would bring it to me, but as to the exact investigation he did, I couldn't give you an honest answer to the day.

Q. Do you recall whether or not you had discussions with Mr. Keeling where he would bring back information to you?

A. Well, we did mention the fact that the church members had known. He mentioned to me about the psychiatrist. Whether there were other specific instances, no, I can't.

Q. Do you recall whether you discouraged, actively discouraged, Mr. Keeling from investigating any matter associated with the Mickens case?

A. No, I did not discourage Mr. Keeling in any matter.

Q. You testified earlier you thought you had done [186] 90 percent of the work. Is that you felt like you were doing 90 percent of the work or is that something the Court should rely on as an accurate assessment—

A. Its just the way I felt.

Q. You felt like you were doing the vast majority of the work on the case?

A. Yeah, but you have to also—I'm trying to give you an honest answer because you have to take into consideration I filed the petitions for appeal, all three petitions, and did all that. When you add it all together, then yeah, I think I did 90 percent of the work. I probably feel like I did 120 percent of it, but—

THE COURT: Well, let's go back to the time before the trial and at that time trial. How much of the work did you do before, pretrial preparation, and at the trial relative to him?

THE WITNESS: I would still have to say I feel something about that, but I can't guarantee how much work Mr. Keeling was actually doing. It's just a feeling. That's all.

THE COURT: All right.

BY MR. HARRIS:

Q. But you indicated earlier that Mr. Keeling was primarily responsible for the sentencing?

[187] A. That's correct.

Q. As far as some of the items that you have been shown here today, the exhibits that have been offered, 2A, B, D, and E, and 4, the isolated parts of your files. You're not questioning in any way that those are not parts of your record?

A. No, they all appear to be in my handwriting and to have come out of the file, yes.

Q. As I understand, you turned over all of your records to the state habeas attorney at some point after you were finished with the case?

A. I told him he could come pick them up.

Q. That would have been, I suppose, at the third proceeding in the Virginia Supreme Court?

A. It was after that, yes.



Q. And you have not had those documents in your custody since that time?

A. No, I haven't.

Q. Now, you don't really have any way today of telling us how complete your notes are based on what you looked at during the brief break a little while ago?

A. I couldn't tell you that.

Q. Now, the fact that you have been shown some notes that indicate there were—for present purposes let's [188] describe them as other suspects—there were reports from other people that there might be other suspects, is that something that you investigated at all at the time you were preparing for this case?

MR. WAGNER: It's been asked and answered, Judge.

MR. HARRIS: Not by me.

THE COURT: I understand what his answer was on direct, but he's asking it on cross, so he can ask it.

A. I didn't go and talk to these people. I can't tell you what else is in the file or what other information I had picked clean through conversations with police that may have led me to do one thing or the other. At this point in time I can't answer that question.

* * * *

[191] Q. And the Newport News Commonwealth's Attorney's office has and has had for a long time an open file policy?

A. That is correct.

Q. And you have had the opportunity to go in and look at the files of Newport News Commonwealth's Attorney's office in preparing for cases?

A. Absolutely.

Q. On many occasions?

A. Yes.

Q. And you have seen police reports, witnesses' statements that are taken at a time soon after a crime and before any defendant is arrested?

A. Yes.

Q. And it's not at all unusual for police to find out if there's any conceivable suspect from any person who may know anything about the crime?

A. I would hope that's what they do.

THE COURT: They better be doing that or we're not spending our money right.

Q. And you're used to seeing police reports that would have people identifying people as potential suspects that never get charged with any crime?

[192] A. That's correct.

Q. But in one of your cases, if you are preparing for one of your cases, are you going to investigate if you see a bona fide suspect in there that may help you defend a case?

A. Oh, yes.

* * * *

[193] Q. As far as this item goes, you indicated you were collecting newspaper clippings before the trial in Mickens case?

A. That's correct.

Q. You may have collected this one?

A. I may have. I don't recall.

Q. And you were collecting those for the purpose of a possible motion for change of venue?

A. Oh, yeah.

* * * *

[199] BY MR. HARRIS:

Q. Did you have any knowledge from any of your investigations in the Mickens case, did you have any information that Timothy Hall had a propensity for violence?

A. Not unless you want to count the allegation of assault and battery against his mother, but that was it.



Q. Did you have any information in the connection with your investigation of the Mickens case that Timothy Hall had any involvement with the criminal element?

[200] A. No.

Q. As far as Timothy Hall's troubled past, do you recall in the Commonwealth's Attorney's records and file that you reviewed there's evidence about Timothy Hall's foster home situation?

A. My recollection is there was information about the foster home situation, but I can't tell you that specifically.

Q. As far as Timothy Hall's troubled past, and beyond the fact he was not living at home, are you aware of anything from your investigation that indicates that Timothy Hall had a troubled past?

A. No.

Q. Now, it was mentioned here that Timothy Hall was arrested according to the police probable cause statement in a high crime area?

A. That's what it says on the probable cause statement.

Q. As I understood it, I believe you started to say this in answer, that this was where he lived?

A. I thought that's where he lived.

* * * *

[203] A. I walked it from the—in the same manner that the gentleman who found the body did, which means that you have to go down to—actually I don't think the street is shown on here. 22nd, 23rd Street, and go down to the river and then walk up the shoreline. You can get down by dropping off the bank, but—

THE COURT: Is 22nd, 23rd Street, is that where those big barges are parked down there as the road turns?

THE WITNESS: Yes, sir, that's where they are at.

[204] THE COURT: What kind of barges are those?

THE WITNESS: I'm not sure.

THE COURT: Or ships.

THE WITNESS: I'm not sure what they are, Your Honor. I know what ships you're talking about.

THE COURT: The big gray ships?

THE WITNESS: Yes, sir.

THE COURT: And then you go down there to the river and walk around and up back west towards Richmond, right?

THE WITNESS: That's correct, Your Honor. And you can walk down the shoreline to there or a couple blocks further west towards Richmond which is not shown on this, there are a set of steps leading down to the river.

BY MR. HARRIS:

Q. The diagram shows 29th Street leading up to the Basic Construction building?

A. That's correct.

Q. Do you recall at what numbered street the steps would be?

A. It might be 30th, it might be 31st or 32nd Street. All I know is—I didn't know they were there until I walked. I wasn't going to climb up the bank, and I just kept walking, and there they were, so I came up [205] the stairs.

* * * *

[213] Q. As far as your discussions with petitioner's counsel in May of 1998 about whether you had discussed matters with Judge Foster, what explanation can you give the Court for misleading petitioner's counsel in May of 1998?

A. I did not intend to mislead him. When he asked me that question, it popped in my head that I had said something about it in court. It turns out after having had an opportunity to think about it for some short—some period of time thereafter, that it wasn't a whether-this-is-a-conflict situation. I can't say it was even in court. All I remember is—

THE COURT: Give him some more water.



THE WITNESS: Thank you.

THE COURT: Just don't even try to answer until you get some water.

A. Thank you. Basically, what I recall about the comment was that I believe it was at preliminary hearing, either shortly before or shortly after the preliminary hearing, and the comment I think I recall [214] making was, and I don't know how it came up. I don't know whether I brought it up or somebody else brought it up. But "If I represent Hall, do you think anybody would let me out of this case?"

Of course, this was at the preliminary hearing, and I knew what we had, and I mean all of the cases, not just this one.

THE COURT: You said that to whom, now?

THE WITNESS: I don't know, Judge. It wasn't really a serious comment.

THE COURT: I know, but whatever it was, I'm not sure if you said "If I represent Hall, do you think they'd let me out of this case?"

THE WITNESS: No, no. Not if I represent Hall. "Since I represent Hall, do you think they'll let me out of this case."

THE COURT: Who were you talking to?

THE WITNESS: I don't recall, Your Honor. That's it.

THE COURT: Was it the judge?

THE WITNESS: No, I don't think it was the judge, Your Honor. My recollection is it was just a joke, a comment. It was not serious because there wasn't in my mind any conflict or any way to get out of the case.

[215] BY MR. HARRIS:

Q. As far as Timothy Hall and your representation of Timothy Hall, you only met with Timothy Hall for one time; is that correct?

A. That's correct.

Q. For up to 20 minutes or half an hour in length? I'm sorry.

A. Yes.

Q. Did you conduct any independent investigation of Timothy Hall's background—

A. No.

Q. —at the time you had been appointed to represent him?

THE COURT: Represent Hall or represent Mickens?

MR. HARRIS: Represent Hall.

A. No.

Q. Did you ask, and I'll add the same caveat as the Judge did, I'm not inquiring of any confidential information your client may have given you, but did you ask your client for any personal information about him at all?

A. Since it was on the petition I asked him why the Department of Social Services has custody. The only reason I know that is because it's in my notes, and I [216] asked him—

MR. WAGNER: This is unresponsive, Judge. All this calls for is a yes or no answer.

THE COURT: Overruled.

A. And that's it. I mean, I did ask him about certain things like the time of the offense, but I don't know which offense I was talking about.

Q. As far as did you ask him about any witness that you might need or might want to talk to about the charges you represented him on?

A. No.

THE COURT: Are you talking about Hall?

MR. WAGNER: Hall.



A. Mr. Hall. No.

MR. WAGNER: For now, Judge, all I'm talking about is Mr. Hall.

A. No.

Q. As far as did you seek out any witnesses on your own concerning Mr. Hall's cases?

A. No.

Q. Do you remember when you spoke to him as far as what day of the, what date? Do your records show that?

A. I don't know whether my records would show it or not. I don't know where the appointment book is, but [217] I have absolutely no—when I answered your questions, I'm basing it on what I see in my notes and also on the fact that all I ever saw the kid was one time for a very short period of time.

Q. Did you ever talk to his mother?

A. No.

Q. At the time you represented Walter Mickens did you ever talk to his mother?

THE COURT: Whose mother?

A. Whose mother?

MR. HARRIS: I'm sorry for doing that. Timothy Hall's mother.

A. No.

Q. Did you ever talk to Timothy Hall's social worker?

A. No.

Q. Did you know who the name of the social worker was?

A. No.

Q. Did you know he had a social worker?

A. I don't recall he had one.

THE COURT: You mean in representing Mr. Mickens, did you go talk to the social worker who had represented Mr. Hall? Is that your question?

MR. HARRIS: Actually, my question was when he was representing Mr. Hall did he talk to Mr. [218] Hall's social worker if you're aware of one.

A. No.

THE COURT: Let me interrupt you. While you were representing Mr. Mickens, did you go talk to Mr. Hall's social worker?

THE WITNESS: No, Your Honor, I didn't. I did not.

THE COURT: All right.

BY MR. HARRIS:

Q. You submitted at my request, you have endorsed and signed under penalty of perjury an affidavit in this court in this action stating that you had no information that Timothy Hall was a male prostitute. Was that information accurate?

A. That's correct.

Q. And you also stated in your affidavit under oath in this action that you had no information from Timothy Hall that had any relevance to Walter Mickens' case. Is that an accurate statement?

A. That's correct.

Q. Now, as far as you're concerned, or were concerned at the time you represented Timothy Hall, when did your representation of Timothy Hall end?

A. Ended when I walked into the courtroom and they told me he was dead and the case was gone.

[219] THE COURT: At that time had you been appointed to represent Mr. Mickens?

A. No, sir. I didn't even know he was dead until I walked in, and nobody had been arrested.



BY MR. HARRIS:

Q. At the time that you represented Mr. Hall—well, let me ask you this: As far as you're concerned, did you receive any confidential communications from Timothy Hall? Without telling me what they are, did you receive any confidential communications from Timothy Hall in the course of your representation of Timothy Hall?

A. Not really, no.

Q. In connection with Walter Mickens' case now—

THE COURT: So whatever Mr. Hall told you was not communicated in confidence to you; is that 'right? Because if that's right, then I'm going to ask you to tell me everything he told you because there isn't any privilege that attaches to that under the *Swidler* case.

MR. HARRIS: Your Honor, I would just ask that some care be taken to establish what his understanding of what a confidential communication is.

THE COURT: Well, you started this, so you go ahead.

[220] MR. HARRIS: I'm not going to ask him. I have no need to know.

THE COURT: Well, then I will let you finish what you're doing and then I will follow that up. I don't want to interrupt your stream of thought.

MR. HARRIS: Judge, as you may have noticed, there's not a very good stream of thought going here.

Q. As far as the preparation of Walter Mickens' case, at the time you were preparing for Walter Mickens' case, was it in the forefront of your mind that you had represented the victim of the murder?

A. No.

Q. Did you see any connection at all between Timothy Hall's circumstances and your representation of Walter Mickens?

A. No.

Q. It was suggested and you were asked whether you had considered offering any—and correct me if I'm wrong—whether you had offered any negative evidence about the victim in this case. As I recall, your answer was you did not consider it. Am I wrong?

THE COURT: Why don't we do this: His testimony stands as it, was presented at the time. And you all will have a chance to deal with that. If you wish to pursue it, just ask the question.

[221] Q. I will ask this: Did you indicate that you were not aware of rumors of Timothy Hall being a homosexual at the time of the Mickens trial, if you can recall?

A. I do not recall any—I can't say that there were. I don't know. I don't recall right now.

Q. Do you know as a lawyer with over 25 years of experience, are you aware of any way to get rumor into evidence?

That's a serious question, Mr. Saunders.

A. Rumor?

Q. Yes.

A. Not that I'm aware of.

Q. Are you aware of any way to get into evidence that Timothy Hall had charges that were dismissed?

A. It's not relevant to anything that I'm aware of.

Q. As a criminal defense attorney in Virginia, are you allowed to ask witnesses how many times have you been arrested?

MR. WAGNER: What was the question?

THE COURT: How many times they've been arrested.

A. No. I can ask them how many times they've been convicted.

MR. HARRIS: That's correct.



THE COURT: Wait a minute. That's not [222] right. It depends on what the issue is as to whether or not you can ask them how many times they've been arrested. You can't impeach them with evidence of an arrest, but there could be a circumstance where being arrested is relevant and you can ask them that question.

MR. HARRIS: I am confining myself to the concept of impeachment.

Q. It is your understanding you cannot impeach a witness by evidence they had been arrested for charges if they were not convicted?

A. That's my understanding of the law in the State of Virginia, yes.

Q. Are you familiar at all with Virginia's rape shield law?

A. Yes, I am.

Q. Is it your understanding of the rape shield law in Virginia that you are allowed as a defense attorney to put on reputation evidence about the victim of a sexual crime?

MR. WAGNER: I'm going to object to his opinion, Judge.

THE COURT: We're not calling for his expert opinion. The issue is what animated his decisions in 1992, and if you wish to address that—

[223] MR. HARRIS: I will try to save us some time.

THE COURT: —you may do that.

Q. As far as the—you made a comment in your direct testimony that if you were asked the question of whether you should have brought the issue up of your prior representation of Timothy Hall, if you had been asked that now, you would say yes, but the answer in the year 1992 or 1993 is no. Is the reason your answer is yes now because you have been sitting here for the last four hours?

A. That's right.

Q. At the time you represented Walter Mickens did you see even a potential for a conflict of interest with representing or having previously represented Timothy Hall?

A. I saw no—no, I did not.

Q. Concerning the possibility or consideration of a consent defense in the representation of Walter Mickens, are you saying that you did not consider a consent defense in this case—is that in the context of Walter Mickens' statement to you that he was not involved in this case?

A. Yes.

Q. Do you see any evidence of consent otherwise in [224] this case that you could have presented?

THE COURT: Otherwise than what?

MR. HARRIS: I don't remember what I just said.

THE COURT: Put that one back in the box and start with another one.

MR. HARRIS: I'm sorry.

Q. Outside of the defendant's statement, you have indicated it was in the context of the defendant's statement is the first question. And let's assume or did you have any discussions with Mr. Keeling? I'm not asking you to assume. Did you have any conversations with Mr. Keeling about what kind of defense you could present if Walter Mickens did not testify?

A. Not that I'm aware of, no.

Q. Did Walter Mickens tell you that he wanted to testify?

A. Mr. Mickens did indicate he wanted to testify.

Q. Did you give him any advice at all on whether he should testify at trial?

A. My best recollection is that I didn't think it was in his best interest.



THE COURT: The question is did you advise him not to testify or to testify or give him any other [225] advice about whether he should testify?

THE WITNESS: I did not advise him to testify.

THE COURT: Did you advise him not to testify?

THE WITNESS: I indicated to him I did not wish him to—think it would be in his best interest to testify.

My phraseology to him may not have been exactly that, Your Honor.

THE COURT: It seldom is.

BY MR. HARRIS:

Q. Mr. Saunders, why did you not tell Judge Foster that or remind Judge Foster or inform Judge Foster that you previously had represented Timothy Hall?

A. Because I didn't see—this conflict issue never even occurred to me during any period of this time as an issue that was really there is I guess the reason I didn't say anything to him.

Q. Is that the same reason you didn't say anything to Mr. Mickens?

A. I don't know whether I told Mr. Mickens or not.

If he says I didn't tell him, that's fine. I wouldn't have seen any reason to tell him. It wasn't an issue in the case.

[226] MR. HARRIS: That's all the questions I have, Judge. I understand you have some.

MR. WAGNER: Did you want to follow-up, Judge?

THE COURT: Well, my only question is did Mr. Hall impart to you during your representation of him any confidential information? I ask you that for this reason: As I understand the law, you are absolutely prohibited from communicating in this proceeding any confidential communication that Mr. Hall passed to you. And I don't want to know

that and nobody else here does. But if you have information from Mr. Hall that might be pertinent here and it was not passed to you in confidence, then Mr. Wagner is permitted to inquire about it.

So I ask you do you have any information that he communicated to you, Mr. Hall did, during your representation of him that was not confidential?

And I have to leave to your judgment and recollection exactly what was and wasn't because that's the inherent nature of the attorney/client privilege, particularly when the client has passed away.

THE WITNESS: I understand what the Court is [227] saying. My problem is, to be honest with you, I don't recall the interview itself. All I've got is some notes and in those notes it appears to be nothing that's confidential.

THE COURT: But you don't recall what he told you other than to the extent it may be reflected in those notes?

THE WITNESS: That's correct.

THE COURT: All right, I understand. Thank you.

REDIRECT EXAMINATION

BY MR. WAGNER:

Q. Mr. Saunders, you testified that the conflict issue never occurred to you. Let me pose this situation to you. If you were on trial for capital murder, wouldn't you want to know whether or not your appointed trial counsel represented the person that you were alleged to have killed?

A. I guess so. I don't know.

Q. You guess so? You don't know?

A. Mr. Wagner—

MR. HARRIS: Your Honor, I just have to object to that for relevance grounds. Whether he would want something as a



criminal defendant is not [228] relevant. It's whether he is required to tell him.

THE COURT: Overruled.

Q. Can you explain that? I mean, can you conceive of any situation where you would not want to know whether or not that lawyer who is representing you had represented the victim you were accused of killing?

A. Mr. Wagner, that may be absolutely correct in Mr. Mickens' mind. It may be true here. It never occurred to me because it wasn't an issue in the case. We have got something way over here. We have a dead body. Nothing that I knew or did or had anything to do with Mr. Hall had anything to do with this particular case.

Q. Doesn't the victim's character have something to do with the sentencing of the person alleged to have killed the person, that victim?

A. In this case?

Q. I'm talking in general, Mr. Saunders.

A. That takes up too broad an area. I've had cases where the victim's character might have had something to do with it, and I've had numerous cases in which the victim's character had absolutely nothing to do with sentencing.

Are you trying it to the jury or are you trying it to the Court?

[229] Q. If you had a witness who could testify that Mr. Hall was a male prostitute because that witness observed Mr. Hall engaging in that practice, would you have tried to put that evidence in at his trial?

A. In all probability, yes, provided that I had information that Mr. Mickens and he had gotten together in that manner.

Q. So the only way you would present it is if Mr. Mickens would have provided you with that information?

A. There has to be some connection, Mr. Wagner, between the case. All right? Now—

Q. My question was simply, the only way you would have presented it is if Mr. Mickens would have provided you with this information? Is that a yes? Is your answer yes or no to that or do you need to explain?

A. I can't tell you that right now, Mr. Wagner, because I didn't have that.

THE COURT: He can't answer your question.

Go ahead.

MR. WAGNER: That's fine.

Q. If you had a malicious wounding case and your client was telling you that he did not do it; that it wasn't him; that it's a case of a bad identity, a [230] mistaken identity, all right? Yet at the same time you had one witness saying that there was a breaking of the skin and another witness—one witness was saying there was a breaking of the skin, the other witness saying there was not a breaking of the skin, would you present essentially a dual argument there? One that my client didn't do it, but the Commonwealth hasn't proven its case of malicious wounding?

A. I do that all time.

Q. Why didn't you do it or at least consider doing it in this case where you could have said, "My client didn't do it; Mr. Mickens didn't do this crime, but the Commonwealth hasn't proven attempted forcible sodomy because of consent?" Why didn't you, Mr. Saunders?

A. Consent never occurred to me. The argument was they haven't proven it beyond a reasonable doubt.

Q. You argued that they hadn't proved consent beyond a reasonable doubt?

A. I believe I got the instruction by making a motion to strike. I can't recall everything I said in closing argument, but I made a motion to strike to Judge Stephens that the Commonwealth had not proven the attempted forcible sodomy beyond a reasonable doubt.



[231] Q. Because of consent?

A. No, not because of consent. I told you, Mr. Wagner, I did not even think of there being a consent. I had no foundation from the information provided to me by Mr. Mickens for which to even conceive of that. Now—

THE COURT: I think you have answered the question.

MR. WAGNER: Very well.

Q. You answered the question whether or not you could put on evidence of an arrest; is that right?

A. I've been asked that question.

Q. Now, if you wanted to try to establish the character or attack the character of the victim, can't you put on unadjudicated conduct into evidence?

A. Excuse me.

THE COURT: Do you need a break?

THE WITNESS: No, it's just sinus drain.

A. I believe the question was in context of impeachment.

Q. It was, but my question to you is can you put on, for instance in the sentencing phase, unadjudicated conduct to try to attack the character of the witness or victim?

I see you're looking to Mr.—

[232] A. No, I'm not looking to him at all.

Q. —to Mr. Harris.

MR. HARRIS: Are you confused with the rule for the unadjudicated misconduct of a defendant?

MR. WAGNER: No, I'm not confused. I'm asking him

THE COURT: Unadjudicated or prior bad acts are admissible in the federal system as to witnesses' credibility depending on what the issue is. And you're asking him in the state sentencing proceeding. The federal sentencing proceeding is you can put on anything as long as it passes some kind of Rule 403 balancing approach that's applied to the statute, but let's go back again now.

Is it your understanding that in a sentencing proceedings in 1992 in Virginia that you could or could not have put on misconduct on the part of Mr. Hall even if the misconduct had not resulted in a conviction?

A. I don't think you could have, Judge.

THE COURT: You do not think you could have?

THE WITNESS: On the victim now?

THE COURT: Yes, the victim.

THE WITNESS: It might depend on the set of circumstances, what the nature of the charge was, but—

[233] THE COURT: Right.

THE WITNESS: But just as a straight proposition—

BY MR. WAGNER:

Q. Mr. Saunders, there's a statutory mitigator dealing with consent that might have led to the death of the victim; is that right? Wouldn't that information, character evidence of the victim, be relevant to that determination of consent as a statutory mitigator?

A. Let me see if I understand the question.

THE COURT: What bad act or character are you talking about?

MR. WAGNER: I'm just talking about a general question, Judge, if you can introduce bad acts, if you can introduce character evidence relevant to that statutory mitigator.

MR. HARRIS: Judge, at this point is this really relevant? Do you have any evidence here—is there any evidence of bad acts? I haven't seen any evidence of bad acts. Are we just talking about a theoretical possibility?

MR. WAGNER: It can just be situational circumstances.



[234] THE COURT: Are you asking him if he thought that he could have introduced the fact that Mr. Hall was a homosexual in mitigation of the offense—I mean, in the sentencing proceedings if he could have proved that Mr. Hall was a homosexual?

MR. WAGNER: Not a homosexual, Judge. I'm dealing here with the question of his arrest on a concealed weapons charge in a high crime area.

THE COURT: All right.

Do you think that that evidence could have come in in the sentencing phase of the trial?

THE WITNESS: I don't think so, Your Honor, not from the premise he's laid down.

THE COURT: He said he doesn't think so.

BY MR. WAGNER:

Q. Now, you made a comment in explaining why there was this discrepancy about the statement to Judge Foster. And you said jokingly you say, "Would anyone let me out of the case if they knew I represented Hall?"

A. That's not the exact words.

Q. I am paraphrasing some, but did you want to get out of the case?

A. Not real—I mean, no, I didn't really want to get out of the case. It was a joke. I have a bad [235] sense of humor. A terrible sense of humor.

Q. Did you have a problem with representing Mickens in this case?

A. No, I didn't have any problem with representing Mr. Mickens in this case. What I had a problem with was losing my butt on the financing part, but that's beside the point. That had nothing to do with my representing Mr. Hall. I mean, Mr. Mickens.

Q. Now, in response to Mr. Harris's question about the questions about the FBI profile, the expert testimony, is it your position that you can't have an expert testify in his opinion about all the facts and circumstances of the case and whether or not that those facts and circumstances lend to a defense of consent?

A. Wait a minute. You can have an expert to testify in his field if it will help the jury in a given area. You can't have an expert testify to an ultimate fact that the jury has to decide. And I don't know how you're going to get an expert in a consent field to come in and testify because I don't know of any experts in the consent field.

Q. Let me back up. The FBI agents in their statements indicated that because there were no defensive wounds, that the person who did this [236] probably knew the victim; is that correct?

A. No, that's not what they said.

Q. What did they say?

A. They said they might have known him or there was no threat, no perceived threat. But this is not something I personally talked to the FBI agents about. This was represented as a partial profile. It was an investigative tool to the police for what type of individual to look for.

Q. What objection would be raised to your introducing this expert testimony—

THE COURT: All right. Mr. Wagner, we don't need to get into any of this. Anything else?

MR. WAGNER: Yes, one more question, Judge.

BY MR. WAGNER:

Q. You testified in response to Mr. Harris's question that you didn't ask a question to Jacobs about the shoes for tactical reasons, is that correct, about the dates of when he obtained the shoes?



A. I didn't ask him because it was already clarified that it couldn't have been after the date or before the date of the thing, of the murder.

Q. All right. Do you recall testifying in deposition that you missed it?

THE COURT: That what?

[237] MR. WAGNER: That you missed this issue.

A. Do you remember my asking what that premise was?

THE COURT: Wait a minute. Listen to the question. Answer just the question.

BY MR. WAGNER:

Q. Do you remember testifying under oath at deposition that you may—you did or you may have missed this issue?

A. That's correct. Now, the premise was I asked you, specifically whether or not it had been straightened out. And you told me no. And under those circumstances because I didn't recall at that particular time that this is the sequence of what happened, but I do recall that that's what I told you when I first talked to you that happened.

Then you told me it had not been straightened out, and then I recalled that I had told you, and that that's what had happened.

Q. Did you say you were sick that day?

A. I was. I was sick that day. At least at the end.

Q. Are you saying you may have missed it because you were sick?

MR. HARRIS: Can you give me a page?

MR. WAGNER: Sure. Page 79.

A. Based on the premise that it had not been [238] straightened out as you told me it had not, yes. I think that's exactly what I told you.

Q. Let me read you from the transcript page, page 79 starting at line 11. Can you conceive of—and this was talking about Jacobs and the shoes.

"Can you conceive of any reason why you wouldn't have asked him?"

"Answer: Other than—no. Other than having—well, if they had already laid the foundation to correct any mistakes they may have made."

Line 16, "Question: Assuming there was no foundation laid?"

Line 17, "Answer: No, I cannot other than having missed it. I maybe missed it because I wasn't feeling that great at that point in time."

Was that your answer to the question?

A. If you're reading from that transcript, that's what I said, I guess. I don't have it in front of me, but I'm not disputing that.

The question was assuming that they had not straightened it out.

Q. And you didn't give any indication that for tactical reasons you failed to ask him about when he got the shoes?

[239] A. I'm trying—no, I didn't say—but the premise was if it hadn't been straightened out, there was no reason to ask him about it. The kid had already testified that they were his shoes. All right? What purpose did it serve to try and ask to Mr. Jacobs when I could see that they had already straightened it out?

Q. This was a pair of Nikes, wasn't it?

A. They have been identified.

THE COURT: Let me get something straight. Did Raheem—is it Rasheem or Raheem?

THE WITNESS: I think it was Raheem, Your Honor.

THE COURT: Did Raheem Gordon say that he had given these tennis shoes to Mr. Hall?

THE WITNESS: Yes.



THE COURT: That's what you're talking about?

THE WITNESS: Those are the shoes that he identified as his and had loaned to Mr. Hall. I don't think he had given them to him.

THE COURT: He loaned them to Mr. Hall.

THE WITNESS: I don't believe he testified he had given them to him. He had loaned them to Mr. Hall, and those were the shoes that Mr. Hall was wearing on March the 28th or 29th.

[240] THE COURT: All right. Go ahead.

BY MR. WAGNER:

Q. But there were a lot of Nikes in the marketplace at that time and out in the community at that time; is that right?

A. That's absolutely correct.

Q. Raheem Gordon could have been mistaken that the shoes that were on Timothy Hall were the same shoes that he had given him; is that correct?

A. I believe I cross-examined him on that, and my recollection is he was positive. There was some mark or some identifying thing on those shoes that made him say that those were specifically those shoes and that's how he could positively identify them. I don't know what it was, but that's my recollection of what his testimony was.

MR. WAGNER: Thank you. No further questions.

THE COURT: All right.

MR. HARRIS: Just one question, Your Honor.

RECROSS-EXAMINATION

BY MR. HARRIS:

Q. Mr. Saunders, out of a sense of loyalty for Timothy Hall, did you do or fail to do anything on [241] behalf of Walter Mickens at his trial?

A. No.

MR. HARRIS: Okay. That's all I've got.

THE COURT: Can he be excused? Can Mr. Saunders be excused?

MR. HARRIS: I'm not offering any other evidence.

MR. WAGNER: I'm afraid I missed one question. If I can just

THE COURT: While Mr. Saunders is here, go ahead.

MR. WAGNER: A little out of order here.

REDIRECT EXAMINATION

BY MR. WAGNER:

Q. You testified that you did or you may have spoken with Alysha Thrash?

A. That's correct, yeah.

Q. Can you describe her?

A. No, I can't. I think if I remember correctly I tried to call her on the phone and—I don't personally remember—I don't think I ever met her face-to-face. I think it was a phone call.

Q. Do you have a specific recollection of that phone call?

[242] A. Let me see. I believe that I called and I think the father answered the phone.

THE COURT: So you didn't talk to her?

A. Oh, I talked to her, but I think the father answered the phone. She was, I think

THE COURT: So you didn't talk to her?

THE WITNESS: Oh, I talked to her. But he's asking me specifically what I recall, and she was reluctant to talk to me, but that was it. I talked to her on the phone that brief period.

Q. Why did you call Alysha Thrash?

A. I just wanted to find out what this note meant that there may have been some other people seen.

Q. I'm sorry? Some other people?



A. Seen in the area.

Q. People seen in the area. But didn't her report in the Commonwealth's file also indicate that she had talked to someone who said that Mr. Hall was being chased by a prostitute?

A. Not that I recall. Being chased by a—no, I don't recall that.

Q. Did you ask her about that?

A. No, I don't recall asking her about that. Like I said, I don't recall that being in her statement to anybody. I think the things have been introduced, but [243] I don't recall any chasing.

Q. Do you recall asking about the male prostitute issue?

THE COURT: I think he just said he didn't ask her about that; is that right.

THE WITNESS: The only thing I thought, the only thing I remember was I wanted to—there was some statement someplace that there may have been some people seen down in that area, and I wanted to find out, if possible, who may have seen them.

THE COURT: So you didn't ask about the prostitute?

THE WITNESS: No, I didn't ask that.

* * * *

VIRGINIA: IN THE JUVENILE AND DOMESTIC RELATIONS COURT, FOR THE CITY OF NEWPORT NEWS, VIRGINIA

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COMMONWEALTH,

VS

WALTER MICKINS, JUNIOR.

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BEFORE: Honorable Aundria Foster, Newport News, Virginia
July 17th, 1992

* * * *

[128] MR. GWYNN Judge, based on the evidence you: have heard of course we're just here for probable cause, I think the evidence is sufficient on all of the charges that are before you today to submit all these matters before the next Grand Jury.

MR. SAUNDERS: They may have amended an abduction to read 28th through 30th, but I don't have any evidence of an abduction. There's no evidence there of that. I recognize the Court is going to certify the capital murder to the Grand Jury, but I don't think there's any evidence as to the abduction charge against him. Are we going to do anything other than this case today?

MR. GWYNN: Yes. Judge, if I may interject, in reference to the abduction, to substantiate the abduction code requires that any person who by force, intimidation or deception without legal justification or excuse seizes, takes, transports, detains or secretes the person of another, according to 18.2-48, with the intent to defile.

I would certainly submit to you that based on the evidence you've heard given the location of the victim, given the number of stab wounds, given his condition I [129] think it's reasonable to infer from the evidence that he did not remain



on this mattress allowing himself to be stabbed 143 times with his own free will. All the statutes requires in order to substantiate an abduction is that the victim be detained. And I think we can safely infer from the evidence you've heard and, again, given the crime scene, give the condition of the victim most particularly, again, I think it's reasonable to infer from that evidence that this victim was not there or did not remain there with his own free will and allow himself to be stabbed 143 times by this defendant or anyone else.

So, I think the statute doesn't require that a person be transported, that they be taken, it's written in the subjunctive. And all it requires is that by force, threat or intimidation that a person be detained against his will. And I think certainly for purposes of probability the Commonwealth has met it's burden on that particular charge.

THE COURT: All right.

MR. SAUNDERS: The problem with that is that if you're going to certify the attempted sodomy and the capital murder this is sort of like saying that when you're raping someone you're detaining them and you're abducting them. Now, that has been ruled to be part and partial of that particular offense by the Supreme Court. And therefore I don't believe that the evidence by drawing the inferences that the Commonwealth wants you to draw would be sufficient because it's [130] all part of either the attempted sodomy or the capital murder. They're just shotguning it.

MR. GWYNN: I'll concede Mr. Saunders does have a valid point or the abduction charge, Judge.

THE COURT: The Court is going to certify the capital murder finding there is probable cause in the capital murder charge. Also that there is probable cause on the forceable sodomy charge. I find that there is no probable cause on the abduction with intent to defile. And do you care to comment on the robbery?

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

[Filed Jan. 15, 1999]

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Civil Action No. 3:98cv102

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WALTER MICKENS JR.,

*Petitioner*,

v.

FRED W. GREENE, WARDEN,

*Respondent*.

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ORDER

For the reasons set forth on the record, during the hearing held on January 13, 1999, pursuant to Rule 6(a) of the Rules Governing § 2254 Cases in the United States District Court, it is hereby ORDERED that the Clerk shall issue a subpoena duces tecum to the Juvenile and Domestic Relations Court for the City of Hampton, Virginia requiring production of all juvenile and domestic relations court files involving Timothy Hall. The documents shall be delivered under seal to the Clerk of this Court for examination *in camera* by the Court before the any further release or review of those files is permitted in this case and then only upon such terms as are provided by further order of the Court.

The subpoena shall be issued to Wilhelmina Parker, Clerk of the Hampton Juvenile and Domestic Relations Court, 30 Kings Way, Hampton, Virginia 23669.

The Marshal is directed to serve the subpoena along with a copy of this order.



The Clerk is directed to send a copy of this order to counsel of record.

It is so ORDERED.

/s/ Robert E. Payne
ROBERT E. PAYNE
United States District Judge

Richmond, Virginia
Dated: January 15, 1999

UNITED STATES DISTRICT COURT, E.D. VIRGINIA
Richmond Division

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No. Civ.A. 3:98cv102
Decided: November 5, 1999

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WALTER MICKENS, JR.,
*Petitioner*,

v.

FRED W. GREENE, WARDEN,
*Respondent*.

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[F. Supp. 2d 589] Robert E. Lee, Jr., Richmond, VA, Robert J. Wagner, Wagner & Wagner, Richmond, VA, for plaintiff.

Robert Q. Harris, Office of the Attorney General, Richmond, VA, for defendant. [F. Supp. 2d 590]

## MEMORANDUM OPINION

PAYNE, *District Judge*.

Pursuant to 28 U.S.C. § 2254, Walter Mickens, a Virginia state prisoner, under sentence of death, filed a petition for a writ of *habeas corpus* challenging his conviction in the Circuit Court for the City of Newport News for capital murder. The Respondent has moved to dismiss the petition. After conducting an evidentiary hearing on one issue, the Court ordered further briefing. The action is ripe for disposition. Jurisdiction exists pursuant to 28 U.S.C. § 2254.[1]

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[1] Because Mickens filed his petition for a writ of habeas corpus after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") on April 24, 1996, review of the petition is governed by the deferential standards of § 28 U.S.C. § 2254(4), as amended by the



## I. SUMMARY OF THE RECORD

On June 3, 1993, a jury, sitting in the Circuit Court for the City of Newport News, found Mickens guilty of the capital murder of Timothy Jason Hall in the commission of, or subsequent to the commission of, attempted forcible sodomy. On June 7, 1993, the jury concluded that Mickens would pose a future danger to society and that the murder was outrageously and wantonly vile and thereupon fixed Mickens' punishment at death. Mickens appealed his conviction and sentence to the Supreme Court of Virginia.

Upon review of the evidence, conducted in the light most favorable to the Commonwealth, the Supreme Court of Virginia found the following:

On March 28, 1992, Timothy Jason Hall, age 17, resided with 14-year-old Raheem Gordon and Gordon's father in an apartment located at 28th and Washington Streets in the City of Newport News. Hall and Gordon were roommates, and they often exchanged clothes, including shoes.

That day, between 7:00 and 8:00 p.m., Hall gave Gordon a ride, in Hall's automobile, to a party at the nearby Towers apartment building. At the time, Hall was wearing a pair of Gordon's Nike brand "Cross Trainer" tennis shoes. He also was wearing blue jeans and a shirt imprinted with either the word, "Duke," or the words, "Miami Hurricanes." Hall had intended to return to the party, but he never did. Neither Gordon nor his father ever saw Hall after that evening.

Vincent West and Bruce Mitchell also attended the party. About 8:00 p.m., they left the party and went to a nearby convenience store. After purchasing a few items and leaving the store, they sat in a park adjacent to the Towers apartment

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AEDPA. *See Mueller v. Angelone*, 181 F.3d 557, 570 (4th Cir. 1999); *Green v. French*, 143 F.3d 865, 868 (4th Cir. 1998), *cert. denied*, __*U.S.*__, 119 S. Ct. 844, 142 L. Ed. 2d 698, (1999).

building. While sitting there, West and Mitchell saw a man with a bicycle, hiding in some bushes and looking at them. The man later was identified as the defendant, Mickens.

The following day, Gordon saw Hall's automobile. It was parked on West Avenue, near 28th Street, close to the Towers apartment building and in the same place it had been parked the previous night.

On March 30, 1992, about 12:30 p.m., Chris Basford was walking along the James River between 25th and 30th Streets when he saw a body beneath an abandoned construction company building. The body of a male Caucasian was lying face down on a mattress under a sheet of plywood. The body was nude from the waist down, except for white athletic socks, and its legs were spread apart approximately 12 inches. The victim was identified as Timothy Jason Hall.

Pubic hairs were recovered from the victim's buttocks. Bloody "transfer" stains were evident on the outsides of the victim's thighs, and a white liquid substance was observed close to the victim's [F. Supp. 2d 591] anus. Cigarette butts lying near the mattress also were recovered, and the mattress cover was seized for scientific examination. Nearby, the police found a pair of men's blue jeans and white underwear shorts that had washed up in the surf of the river. Gordon identified the clothes as those worn by Hall on the evening of March 28, 1992.

An autopsy revealed 143 separate "sharp force injuries" to the victim's body. Of the injuries, 62 were paired stab injuries that could have been caused by a multiple-blade knife, 13 were single stab wounds, and three were paired incised wounds.

The medical examiner who performed the autopsy concluded that the victim had bled to death and that 25 of the 143 wounds were fatal. The fatal wounds included four pairs of stab wounds that punctured the right lung, three single stab wounds that punctured the left lung, seven stab wounds to the



skull that penetrated the brain, a stab wound to the forehead that also penetrated the brain, one pair of stab wounds that perforated the liver, and a pair of stab wounds to the right neck that severed the carotid artery and the jugular vein.

The medical examiner opined that the fatal wounds may not have caused instant death. Instead, she estimated that the victim could have lived as long as 30 to 40 minutes after infliction of the last wound and that, during this time, the victim may have been conscious.

On the evening of April 4, 1992, the police were informed that a black male, wearing a blue and white jacket and riding a bicycle, had assaulted a juvenile. Responding to this information, Police Officer D. A. Seals and Detective Dallas Mitchell found Mickens riding a bicycle in the parking area of the abandoned construction company building.

Seals exited the police car, displayed his badge, and approached Mickens. Mickens, thereupon, fled on his bicycle. Shortly thereafter, Seals and Mitchell again came upon Mickens as he was being detained by other police officers. Mickens was arrested at 7:00 p.m. on the charges involving the juvenile.

Mickens agreed to talk with the police after being advised of his Miranda rights. Officer Mitchell told Mickens that he knew Mickens had killed Hall, but the officer did not tell Mickens how Hall had been murdered. In denying involvement in Hall's murder, Mickens said, "You didn't find any knife on me; did you?"

The following morning, warrants were obtained charging Mickens with Hall's murder and attempted sodomy. When Officer Seals handed Mickens copies of the warrants, Mickens said, "I accept the warrants, I accept the charges." Seals asked Mickens what was meant by that statement, and Mickens responded, "Mother f___r, if I told you I accept the warrants that means I'm guilty, don't it?"

On April 7, 1992, the police found Michael Jacobs wearing the Nike brand "Cross Trainer" tennis shoes that Hall had been wearing when Gordon had last seen Hall alive. Jacobs told the police that he had bought the shoes from Mickens for $5.00 the previous week.

An examination of the pubic hairs removed from Hall's buttocks revealed that they were from an African-American and were alike in "all identifiable microscopic characteristics" to the pubic hair sample taken from Mickens. The expert who examined the hairs further testified that the hairs could not have originated from Hall because he was a Caucasian. The witness also stated that tissue was attached at the roots of the hairs, indicating the hairs had been forcibly removed, possibly by the rubbing of the genitals against Hall's buttocks.

An examination of a stain found on the mattress cover revealed human sperm. Through DNA analysis (RFLP type) [footnote omitted] of the sperm and of blood samples taken from Hall [F. Supp. 2d 592] and Mickens, the expert determined that Hall could not have produced the stain. The expert determined further that Mickens' DNA pattern matched the DNA pattern in the stain on the mattress cover. The witness also stated that the approximate percentages of the population that could have deposited the stain was one in 27,000 Caucasians, one in 6,000 African-Americans, and one in 2,000 Hispanics.

The cigarette butts and certain other hairs recovered at the crime scene also were subjected to DNA analysis (PCR type). [footnote omitted] Both Hall and Mickens had D. Q. Alpha type 1.2, 4. The expert making the comparisons determined that Mickens could not be eliminated as the source of the hairs and of the saliva on the cigarette butts. Mickens smoked cigarettes, and Hall was never known to smoke cigarettes.



Tyrone Brister testified that, when he and Mickens shared a holding cell at the courthouse on March 26, 1993, he asked Mickens why he was in the cell. Mickens answered, "They said I stabbed somebody 140 something times in the head." Mickens then lowered his voice and said, "which I did." Mickens also told Brister that "they" said he also sodomized the victim and stole his sneakers. Again, Mickens lowered his voice and said, "which I did."

*Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678, 681-83 (1994).[2]

Following Mickens' unsuccessful appeal to the Supreme Court of Virginia, the Supreme Court of the United States remanded the case to the Supreme Court of Virginia for further consideration in light of *Simmons v. South Carolina*, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994) (holding a capital defendant has a right to inform his sentencing jury that he is ineligible for parole). *See Mickens v. Virginia*, 513 U.S. 922, 115 S. Ct. 307, 130 L. Ed. 2d 271 (1994). The Supreme Court of Virginia thereafter remanded the matter to the trial court for resentencing. *See Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9 (1995).

At the resentencing proceedings, Mickens was represented by the same lawyers who had represented him at trial. The trial court conducted a new sentencing hearing before a jury. After hearing evidence in aggravation and in mitigation, the jury fixed Mickens' punishment at death, based upon both the "vileness" and the "future dangerousness" predicates of Virginia's death penalty statutes. *See Mickens v. Commonwealth*, 252 Va. 315, 478 S.E.2d 302 (1996), *cert. denied*, 520 U.S.

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[2] The findings of fact made by the Supreme Court of Virginia are binding on this Court. *See* 28 U.S.C. § 2254(e)(1); *Pope v. Netherland*, 113 F.3d 1364, 1367 (4th Cir.), (citing *Sumner v. Mata*, 449 U. S. 539, 546-47, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981)), *cert. denied*, 118 S. Ct. 16 (1997).

1269, 117 S. Ct. 2442, 138 L. Ed. 2d 202 (1997). After conducting a post-trial hearing pursuant to Va. Code Ann. § 19.2-264.5 (Michie 1995), the Circuit Court of the City of Newport News followed the jury's recommendation and sentenced Mickens to death.

Mickens subsequently appealed his sentence. The Supreme Court of Virginia denied the appeal. *See Mickens v. Commonwealth*, 252 Va. 315, 478 S.E.2d 302, 304 (1996), *cert. denied*, 520 U.S. 1269, 117 S. Ct. 2442, 138 L. Ed. 2d 202 (1997). Then, Mickens filed a petition for a writ of habeas corpus with the Supreme Court of Virginia. That petition was denied summarily without explanation of the reasons.

On February 24, 1998, Mickens filed a motion for the appointment of counsel to represent him in filing a federal habeas corpus petition. Counsel were appointed and Mickens filed a petition in which he raised the following grounds for relief.

## II. GROUNDS FOR FEDERAL HABEAS CORPUS RELIEF

Mickens' claims are restated verbatim from his petition: [F. Supp. 2d 593]

1. The evidence was insufficient to convict Mr. Mickens of attempted forcible sodomy because there was no evidence adduced at trial to indicate that the intent of the attacker was to attempt to forcibly sodomize Hall, especially because the act was consummated and there was no trauma to the anus of the victim.

2. The evidence was insufficient to convict Mr. Mickens of capital murder since the evidence was insufficient to prove attempted forcible sodomy and, without the predicate offense, there can be no conviction for a capital offense.



3. Petitioner was denied his Sixth Amendment right to the effective assistance of counsel when trial counsel failed to investigate the facts surrounding the crime, and failed to request an investigator.

4. Petitioner was denied his Sixth Amendment right to the effective assistance of counsel due to trial counsel's failure to request a psychiatric evaluation for Petitioner's sentencing, pursuant to *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S. Ct.1087, 84 L. Ed. 2d 53 (1985) and Va. Code § 19.2-264.3:1.

5. Petitioner was denied his Sixth Amendment right to the effective assistance of counsel because his trial counsel labored under an actual conflict of interest which adversely affected his performance; trial counsel represented both the defendant and the victim.

6. Petitioner was denied his Fifth Amendment right to due process of law and his Sixth Amendment right to the effective assistance of counsel when the trial judge of the Newport News Juvenile and Domestic Relations Court failed to inform Petitioner of the conflict of interest and inquire of the Petitioner whether he was aware of the conflict.

7. Petitioner was denied the effective assistance of counsel when counsel failed to investigate and present the defense of consent to the charge of attempted forcible sodomy, despite the obvious indications pointing to a consent defense.

8. Petitioner was denied the effective assistance of counsel when counsel failed to present any evidence in mitigation at the sentencing hearing, and when counsel presented an unreasonable closing argument at the sentencing.

9. Petitioner was denied his Sixth Amendment right to the effective assistance of counsel because trial counsel failed to request a mistrial when the jury found him guilty of capital murder, without finding him guilty of the underlying predicate offense, attempted forcible sodomy.

10. Petitioner was denied due process of law, and was denied the effective assistance of counsel, when he was resentenced by a jury which had not heard the evidence against him, thereby depriving the jury from considering residual doubt as a mitigating factor in determining the sentence.

11. Petitioner was denied the effective assistance of counsel by counsel's failure to effectively cross-examine crucial prosecution witnesses.

12. The refusal to excuse juror Frank Johnson for cause based solely on the juror's representations to the court denied Mickens the right to an impartial jury.

The assessment of these twelve claims must be made in perspective of certain fundamental principles which circumscribe the reach of the review of state court judgments by federal courts in habeas corpus proceedings. [F. Supp. 2d 594]

## III. EXHAUSTION AND PROCEDURAL BAR

The first of those principles is the doctrine of exhaustion which, simply stated, is that, "[i]n the interest of giving the state courts the first opportunity to consider alleged constitutional errors occurring in a state prisoner's trial and sentencing, a state prisoner must exhaust all available state remedies before he can apply for federal habeas relief." *See Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998) (citing *Matthews v. Evatt*, 105 F.3d 907, 910-11 (4th Cir.), *cert. denied*, 522 U.S. 833, 118 S. Ct. 102, 139 L. Ed. 2d 57



(1997)), *cert. denied* 523 U.S. 371, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998). "To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court." *See Matthews*, 105 F.3d at 911. "Fair presentation contemplates that both the operative facts and the controlling legal principles must be presented to the state court." *Id.* (internal quotations omitted). Thus, in state court, the petitioner is obligated to identify the federal constitutional right purportedly infringed, identify the facts thought to support such a violation, and to explain how those facts establish a violation of his constitutional rights. *Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994). It is important to remember, therefore, that "[t]he exhaustion requirement is not satisfied if the petitioner presents new legal theories or factual claims for the first time in his federal habeas petition." *Breard*, 134 F.3d at 619.

A distinct, but related, limit on the scope of habeas corpus review in federal court is the doctrine of procedural default. Pursuant to that doctrine, if a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the petitioner has procedurally defaulted his federal habeas claim in federal court. *Id.* at 619. A procedural default also occurs when a federal habeas petitioner has failed to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). Absent a showing of cause and prejudice or a fundamental miscarriage of justice, a federal habeas court is precluded from reviewing the merits of a defaulted claim.

Several of these procedural rules apply to the assessment of Mickens' claims. First, under the rule in *Slayton v. Parrigan*,

215 Va. 27, 205 S.E.2d 680 (1974), a Virginia inmate is precluded from raising claims in state habeas proceedings if they could have been raised at trial and on direct appeal but were not. Under Va. Code § 8.01-654(B)(2), "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." *Hoke v. Netherland*, 92 F.3d 1350, 1354 n. 1 (4th Cir. 1996) (internal quotations omitted). Finally, under Va. Code Ann. § 8.01-654.1 (Michie 1995), capital habeas petitioners are required to submit any habeas petition within sixty days after the Supreme Court of the United States denies a petition for a writ of certiorari.

Only Claims l, 2, and 4 have been properly presented to the Supreme Court of Virginia. Mickens contends that the default of Claims 7 through 12 is excused because he has demonstrated cause and prejudice or a fundamental miscarriage of justice. Mickens' arguments of cause sufficient to excuse the default of Claims 7 through 12 and the assertion of actual innocence as to those claims will be addressed first. Discussion of the procedural posture of Claims 1, 2, 3, 4, 5 and 6 will be assessed along with the merits of those claims.

A. Cause Excusing Default of Claims 7 Through 12

Claims 7 through 12 are defaulted under the principles of exhaustion and [F. Supp. 2d 595] procedural bar. To demonstrate "cause" which will excuse the default of Claims 7 through 12, Mickens must establish "that some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court at the appropriate time. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). Ineffective assistance of counsel may constitute "cause" for a procedural default under certain circumstances. *Id.* at 488, 106 S. Ct. 2639.



A topic heading in the petition suggests that Mickens can demonstrate cause and prejudice and actual innocence which will excuse the admitted default of Claim 12. *See* Pet. at 10. However, Mickens fails to specify the basis for that contention in the body of the petition, as required by the Order entered April 7, 1998. Moreover, the arguments of cause put forth by Mickens in support of his Claims 7 through 11 are simply inapplicable to Claim 12. Thus, Mickens' suggestion that he can demonstrate cause and prejudice excusing his default of Claim 12 will receive no further consideration.

Mickens contends that ineffective assistance of his state habeas counsel excuses the acknowledged default of Claims 7, 8, 9, 10 and 11. In support of that contention, Mickens avers by affidavit that: (1) his first communication with state habeas counsel, George B. Pavek, was when Pavek handed Mickens a completed habeas petition for signature; (2) he does not read or write at a level which would allow him to have understood the contents of that petition; (3) Pavek told Mickens that he must sign the petition that day or the court would lose authority to review his case; and (4) he "neither had any input into the contents of the [state habeas ] petition, nor did he have an opportunity to review the petition." (Pet. at 52.) Under those circumstances, Mickens contends that he should not bear the consequences of Pavek's failure to raise Claims 7 through 11 in the state habeas proceedings. *See Deutscher v. Angelone*, 16 F.3d 981, 984 (9th Cir. 1994) (refusing to find inmate's second habeas petition successive when inmate's first petition was not signed or otherwise authorized by the petitioner).

The assertions of cause presented here by Mickens lack the legal and factual predicates to support a finding of cause. First, for an error of counsel to constitute cause, a petitioner must first possess a constitutional right to assistance of counsel. *See Coleman v. Thompson*, 501 U.S. 722, 752, 111

S.Ct. 2546, 115 L. Ed. 2d 640 (1991). A petitioner has no constitutional right to assistance of counsel in state habeas proceedings, even though claims of ineffective assistance of trial counsel can only be raised on state collateral review. *See Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1100, 118 S. Ct. 907, 139 L. Ed. 2d 922 (1998); *Weeks v. Angelone*, 176 F.3 d 249, 273-74 (4th Cir.) (reiterating that the alleged ineffective assistance of habeas counsel cannot constitute cause to excuse a petitioner's defaulted ineffective assistance of trial counsel claims), *cert. granted on other grounds*, __U. S.__, 120 S.Ct. 30, 144 L. Ed. 2d 833 (1999); *Satcher v. Netherland*, 944 F. Supp. 1222, 1263-64 (E.D. Va. 1996), *rev'd on other grounds*, 126 F.3d 561 (4th Cir.), *cert. denied*, 522 U.S. 1010, 118 S.Ct. 595, 139 L. Ed. 2d 431 (1997). Under the law in this circuit, there is no constitutional right to counsel on state habeas review and thus ineffective assistance of state habeas counsel (even if shown) does not constitute cause.

Secondly, Mickens' suggestion that limitations on his literacy capacity precluded participation in the state habeas proceedings is completely lacking in merit. The record shows that Mickens could, and did, read his state habeas petition.[3] (State Habeas Pet. at 31.) Even if that were not so, Mickens' notarized signature, attached to his state habeas petition reflects, "I have [F. Supp. 2d 596] read, and **have had read to me**, the foregoing petition for a writ of habeas corpus and attached motions, and papers." *Id.* (emphasis added). Hence, that ground for cause is rejected as entirely lacking in factual support. *See Kornahrens v. Evatt*, 66 F.3d 1350, 1359 (4th Cir. 1995) (noting that once a court finds the absence of cause, it should not consider the issue of prejudice so as to avoid making alternative holdings).

[3] (5/20/93 Hr. T. at 117, 139); (3/29/96 Hr. T. at 22); (1/13/99 Hr. T. at 196.)



B. Actual Innocence

Initially, in his federal petition for a writ of habeas corpus, Mickens asserted that the default of Claims 7 through 11[4] should be excused because "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). To pass defaulted claims through the actual innocence portal, Mickens must show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* Subsequently, Mickens conceded to this Court that he had failed to present sufficient evidence to show that he was actually innocent. (10/7/98 Hr. T. at 44.) The record demonstrates the wisdom of that concession. *See infra* Sec. IV. For the foregoing reasons, Claims 7 through 12 are defaulted and will be dismissed.

## IV. CLAIMS 1 AND 2: SUFFICIENCY OF THE EVIDENCE

In Claim 1, Mickens asserts that the evidence was insufficient to sustain a conviction of attempted forcible sodomy and that, absent sufficient proof of that underlying predicate offense, the conviction for the murder of Hall subsequent to the attempted forcible sodomy also must fail (Claim 2).

A federal habeas petitioner is entitled to relief on a challenge to the sufficiency of the evidence only if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In Virginia, the elements of attempted forcible sodomy include an intent forcibly to sodomize an individual and a direct, but ineffectual, act toward achievement of sodomy. *See Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678, 687 (1994).

[4] There is no reference to actual innocence in the body of Claim 12.

On direct appeal, Mickens claimed that:

> the Commonwealth failed to prove that he 'intended to commit forcible sodomy or that he did any act towards the commission of the act that amounted to the commencement of the act.' He further contends that the Commonwealth failed to prove that he was the criminal agent in Hall's death.

*Id.*

The Supreme Court of Virginia held that the evidence "clearly established the requisite elements of attempted forcible sodomy":

> Hall's body, naked from the waist down, was found lying face down on a mattress under an abandoned building. His legs were spread apart 12 inches. A white lubricant was on Hall's buttocks near his anus. African-American pubic hairs found on Hall's buttocks were like Mickens' pubic hairs in "all identifiable microscopic characteristics." Tissue attached to the roots of the hairs, indicating that the hairs had been forcibly removed, was consistent with Mickens' having rubbed his genitals against Hall's buttocks. Bloody "transfer" stains were evident on Hall's thighs, and a semen stain found on the mattress cover was consistent with Mickens' DNA pattern. Additionally, Mickens' statements to Officer Seals and to Tyrone Brister confirmed that Mickens had attempted to commit forcible sodomy.

*Id.* at 688; *see Wilson v. Greene*, 155 F.3d 396, 406-7 (4th Cir.) (rejecting similar challenges [F. Supp. 2d 597] to sufficiency of the evidence for attempted rape), *cert. denied*, __U.S.__,119 S. Ct. 536, 142 L. Ed. 2d 441 (1998).

In his federal petition, Mickens suggests, for the first time, that the evidence was insufficient to sustain that conviction because the evidence failed to show that "Mr. Hall was



subjected to any sexual activity against his will, by threat, force or intimidation [and, according to Mickens] . . . the evidence indicated that Mr. Hall went to the location voluntarily." (Pet. at 15.) That theory is defaulted because it has never been presented previously to the state courts. *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.), *cert. denied*, 522 U.S. 833, 118 S. Ct. 102, 139 L. Ed. 2d 57 (1997).

Moreover, the theory ignores the fact that Hall exhibited bruises on the front of his neck, that he sustained multiple stab wounds, and that there was a transfer stain on the back of his thighs. [5] (5/26/93 Tr. T. at 509-10.) The bruises on Hall's neck and the stab wounds are consistent with use of a choke hold and a knife, both of which are indicia of the use of force. And, the transfer stains on the back of Hall's thighs indicate that the killer was stabbing Hall from behind while attempting to sodomize Hall, or before having done so. That evidence forecloses the possibility that any rational finder of fact could conclude that Hall was engaging in consensual sexual activity immediately before his death. For the foregoing reasons, Claims 1 and 2 will be dismissed.

## V. CLAIMS 3 AND 4: ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL

In Claims 3 and 4, Mickens contends that he was denied effective representation by trial counsels' inadequate pretrial investigation (Claim 3) and by trial counsels' failure to request a psychiatric evaluation for sentencing (Claim 4).

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Supreme Court held that to demonstrate the ineffective assistance of counsel, a defendant first must show that counsel's representation was

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[5] Bloody "transfer" stains occur when an object comes into contact with blood and thereafter comes in contact with another surface, thereby leaving a stain on that other surface.

deficient and, then, must establish that the deficient performance prejudiced the defense. *Id.* at 687, 104 S. Ct. 2052. At bottom, in assessing prejudice, it is important to focus on "whether the result of the proceeding was fundamentally unfair or unreliable." *Lockhart v. Fretwell*, 506 U. S. 364, 369, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993).

The deficient performance facet of the *Strickland* test "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 688, 104 S. Ct. 2052. To satisfy this facet of *Strickland*, the defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88, 104 S. Ct. 2052. The standard for deficient performance is "not merely below average performance; rather, the attorney's actions must fall below the wide range of professionally competent performance." *Griffin v. Warden, Maryland Correctional Adjustment Center*, 970 F.2d 1355, 1357 (4th Cir. 1992). Furthermore, in order to avoid the distorting effects of hindsight, a court, on federal habeas review, is required to evaluate "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690, 104 S. Ct. 2052. Finally, the defendant must overcome the "strong presumption . . . that, under the circumstances, the challenged action, 'might be considered sound trial strategy' "(if, of course, the challenged action was a matter of trial strategy). *Id.* at 689, 104 S. Ct. 2052 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). With these principles in mind, it [F. Supp. 2d 598] is appropriate to assess the arguments made by Mickens in Claims 3 and 4.

A. Pretrial Investigation (Claim 3)

In state court, Mickens alleged that trial counsel were ineffective for failing to request the appointment of a criminal



investigator, which "prevented the petitioner from developing and investigating any issues or facts that may have pointed to the fact that *someone else may have been involved.*" (State Habeas Petition at 23, 27-8.) (emphasis added). In Claim 3 of this federal petition, Mickens asserts that he was denied the effective assistance of counsel because trial counsel: (1) failed to investigate a consent defense; and (2) failed to request an investigator to gather evidence to support a consent defense or to gather mitigating evidence. The record shows that Mickens has never given the Virginia courts a fair opportunity to evaluate the adequacy of counsels' investigation or their failure to request the appointment of an investigator to explore evidence of consent and mitigating circumstances. Claim 3, therefore, is defaulted and will be dismissed.[6]

B. Psychiatric Examination (Claim 4)

In Claim 4, Mickens contends that trial counsel were deficient for failing to request a psychiatric examination of petitioner for purposes of sentencing. Mickens suggests that, if trial counsel had requested such an examination, the expert could have testified that Mickens had sustained organic brain damage and therefore had a diminished mental capacity. That evidence would have been mitigating of the offense, says Mickens. The challenge to the performance of trial counsel on this ground is "a product of hindsight and fails to address the facts reasonably relied upon by counsel at the time [of trial and sentencing]." *Roach v. Martin*, 757 F.2d 1463, 1478 (4th Cir. 1985).

For instance, before trial, one of Mickens' trial counsel, Bryan Saunders, asked the court to have Mickens evaluated

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[6] Additionally, Claim 3 lacks substantive merit. In light of the facts facing counsel, *see infra* Sec. VI(E)(1), counsel reasonably chose not to pursue a consent defense. Furthermore, the lack of mitigating evidence is attributable to absence of such evidence rather than the failings of counsel.

for competence to stand trial and for sanity at the time of the offense. (Resp.'s Mot. to Dis. Ex. C. at p 7.) Pursuant to that request, the court appointed Dr. Killian to conduct evaluations of Mickens. Dr. Killian determined that Mickens was sane at the time of the offense and that he was competent to stand trial. *Id.* Counsel's performance cannot be faulted on that issue.

Also, in preparation for the penalty phase, trial counsel reviewed Mickens' prison file. *Id.* at p 8. The file contained a notation which indicated that Mickens may have organic brain damage as a result of sniffing inhalants.[7] *Id.* Saunders conveyed that information to Dr. Killian and asked him whether there was anything in his examinations that would confirm the notation. *Id.* Dr. Killian told Saunders that "he did not have any reason to suspect any problem of brain damage," but he offered to test Mickens. *Id.* Therefore, arrangements were made to transport Mickens for testing, but Mickens refused to take the test. *Id.* Nonetheless, at his first sentencing, Mickens presented evidence, through his testimony and that of his mother, which suggested his aberrant behavior was linked to his history of having sniffed glue.

To have been effective, counsel was not required to second guess Dr. Killian's conclusion or to devote additional time pursuing what appeared to have been an unfruitful line of investigation. *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir.), *cert.* [F. Supp. 2d 599] *denied*, 119 S. Ct. 536, 142 L. Ed. 2d 441 (1998). Moreover, "there is no constitutional basis for a rule that would require a psychiatric evaluation in every capital case." *Clanton v. Bair*, 826 F.2d 1354, 1358 (4th Cir. 1987). Thus, "when a seemingly lucid and rational client

[7] The trial transcripts reflect that Mickens was lucid and rational. Mickens does not assert that trial counsel were aware of any other evidence which would cause them to doubt his mental condition.



rejects the suggestion of a psychiatric evaluation and there is no indication of a mental or emotional problem, a trial lawyer may reasonably forego insistence upon an examination." *Id.* In this instance, trial counsel were assured by both Mickens' conduct and a mental health expert that significant mitigating evidence pertaining to organic brain damage simply was not available. Under such circumstances, counsel reasonably chose not to insist on further mental evaluations.

Finally, although it was reasonable initially to have cast Mickens' purported inhalant induced mental infirmity into the mix of mitigating evidence, an extended defense focused on that issue was unlikely to have been of benefit to Mickens because "[m]ental health evidence like that of [a petitioner's] organic brain dysfunction is a double-edged sword that might as easily have condemned [petitioner] to death as excused his actions." *Truesdale v. Moore*, 142 F.3d 749, 755 (4th Cir. 1998). Here, the mitigating value of such evidence (had it been offered) would have been obscured by the fact that Mickens' purported mental infirmity was caused by sniffing glue and that Mickens continued to abuse inhalants while incarcerated. For the foregoing reasons, Claim 4 will be dismissed.

## VI. CLAIMS 5 AND 6: CONFLICT OF INTEREST

In Claim 5, Mickens contends that he was denied effective assistance of counsel because his lead trial counsel, Bryan Saunders, was representing the victim, Timothy Hall, at the time of Hall's murder. In Claim 6, Mickens makes the related claim that the failure of the Newport News Juvenile and Domestic Relations Court (hereinafter "JDR Court") to inquire into the conflict denied him due process and effective assistance of counsel. The procedural history pertinent to these claims is set forth below (and it is undisputed):

> On February 21, 1992, Janet Heywood, Timothy Hall's mother, swore out a warrant for assault and battery

against her son. Heywood alleged that, on February 16, 1992, Hall grabbed her by the arms and shoved her to the ground.

On or about March 13, 1992, Timothy Hall was charged by Newport News police with possession of a concealed weapon (a serrated bread knife wrapped in paper). Hall was directed to appear before the JDR Court for the assault and concealed weapons charges on March 20, 1992.

At the March 20, 1992 hearing, Substitute Judge Paul Criver, Jr., of the JDR Court appointed Bryan Saunders to represent Hall and the hearing was continued until April 3, 1992.

Sometime between March 20 and March 28, 1992, Hall came to Saunders' office for an interview which lasted fifteen to thirty-minutes. (1/13/93 Hr. T. at 98.) [8] The discussion was confined to the circumstances surrounding each of the charged crimes. (12/23/98 Dep. at 11-26.)

On March 28, 1992, Hall was seen alive for the last time.

On March 30, 1992, Hall's body was discovered.

On April 3, 1992, Judge Foster of the JDR Court removed the charges against Hall from the docket and dismissed them, noting that the defendant is deceased.

[F. Supp. 2d 600] On the same date, Saunders appeared at the JDR court for a hearing on Hall's assault and concealed weapons charges. (1/13/99 Hr. T. at 96-97.) Someone (the

[8] On January 13, 1999, this Court conducted an evidentiary hearing on Claims 5 and 6. Citations to the record of that hearing will be abbreviated as "11/13/99 Hr. T." Also, Mickens has tendered a copy of the transcript of Saunders' deposition conducted on December 23, 1998. Citations to that record will be abbreviated as "12/23/98 Dep."



identity of whom Saunders does not recall) told Saunders that Hall was dead and that the pending cases had been dismissed. *Id.* at 97.

On April 4, 1992, Mickens was arrested.

On April 6, 1992, Judge Foster of the JDR Court appointed Saunders to represent Mickens.

It is undisputed that Mickens was unaware of Saunders' previous representation of Hall until federal habeas corpus proceedings were initiated. Even then, the discovery of these facts was purely fortuitous. In particular, Mickens' federal habeas counsel visited the JDR Court to review Mickens' JDR file. Counsel asked the clerk on duty for any files involving Timothy Hall. Of course, files of a juvenile are confidential and should not have been produced without a court order. *See* Virginia Code Ann. § 16.1-305 (Michie 1996). Nonetheless, a clerk of the JDR Court inadvertently produced Hall's file on the assault and concealed weapons charges. It was then that federal habeas counsel discovered that Saunders previously had represented Hall and requested a copy of the files. The clerk's supervisor intervened, discovered that Hall's file had been improperly disclosed and refused to allow counsel any further access to Hall's files. Subsequently, Hall's files were produced to Mickens' counsel by judicial process.

The Respondent has moved to dismiss Claims 5 and 6 on the ground that they are procedurally barred because they were not presented in Mickens' first state habeas petition. *See* Va. Code §§ 8.01-654(B)(2); [9]

[9] Under Virginia law, "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." *Hoke v. Netherland*, 92 F.3d 1350, 1354 n. 1 (4th Cir. 1996) (citing 8.01-654(B)(2)). Whether this claim was reasonably available will be

8.01-654.1. [10] Mickens counters that, in establishing a conflict of interest on the part of Saunders, he has shown cause and prejudice excusing the default.

A. Cause Excusing Default of Claims 5 and 6

Mickens contends that he has satisfied the cause requirement because the facts supporting the conflict of interest claim were "not reasonably available" before the completion of his state proceedings. *McCleskey v. Zant*, 499 U.S. 467, 493-94, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)). "The question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition." *Barnes v. Thompson*, 58 F.3d 971, 975 (4th Cir. 1995). Here, Saunders' silence and state law requirements for secrecy of juvenile court records operated together to preclude Mickens from raising the conflict of interest claims in his state habeas petition.

It is undisputed that Mickens did not know of the conflict of interest here asserted. And, there were only two sources [F. Supp. 2d 601] from which Mickens could have discovered

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considered as part of the discussion of cause and prejudice (see pp. 600-01 *infra*).

[10] Va. Code § 8.01-654.1 requires capital defendants to file a habeas petition within sixty days of the denial of his petition for certiorari. The last paragraph of that section provides, "notwithstanding the time restrictions otherwise applicable to the filing of a petition for a writ of habeas corpus, an indigent prisoner may file such a petition within 120 days following appointment, made under § 19.2-163.7, of counsel to represent him." Neither Mickens nor Greene suggests this sentence provides Mickens with an opportunity to file another habeas petition with the Supreme Court of Virginia. *Cf. Graham v. Angelone*, No. 99-4, 191 F.3d 447, 1999 WL 710385, at *10 (4th Cir. Sept. 13, 1999) (refusing to extend time for filing capital state habeas petition when new counsel appointed shortly before the deadline).



that Saunders had represented Hall before representing Mickens: Saunders and the Newport News JDR Court. Saunders kept silent, thereby breaching his duty of disclosure. State law foreclosed any access to the JDR Court. On this record, Mickens' failure to explore either of these sources before completion of his state habeas proceedings cannot be characterized as unreasonable.

Because the primary responsibility for discerning conflicts of interests and revealing them to clients and to the courts rests with counsel, Saunders' silence impliedly assured Mickens that there were no potential conflicts from the representation of any previous clients. *See Cuyler v. Sullivan*, 446 U.S. 335, 346, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly if a conflict of interest arises during the course of a trial." *Id.* Whether a lawyer can represent multiple or successive clients is circumscribed by the lawyer's inescapable duty to "explain any circumstances that might cause a client to question his undivided loyalty." Va. Code of Professional Responsibility EC:5-19 (Michie 1992). Saunders' representation of the murder victim, at the time of the murder, is undoubtedly a circumstance "that might cause a client to question his undivided loyalty." *Id.*

Therefore, Saunders was obligated either to have declined appointment to the Mickens' case, or to have fully disclosed to Mickens the fact of his previous representation of Hall and the possible effects that his previous representation of Hall might have on his ability to represent Mickens. *Dowell v. Commonwealth*, 3 Va.App. 555, 351 S.E.2d 915, 917-18 (1987). And, the full disclosure option also obligated Saunders to explain that Mickens' consent would be required before Saunders could continue the representation. *See* Va. Code of Professional Responsibility DR:5-105; EC:5-15; EC:5-17; EC:5-19.

Saunders also was required to have disclosed the previous representation to the appointing court and that would have meant that the facts surrounding the previous representation would have been fully explained on the record. In other words, Saunders' representation would have been permitted only after a full inquiry. *See Wood v. Georgia*, 450 U.S. 261, 272, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 346-47, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 485, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978); *Kirkpatrick v. Butler*, 870 F.2d 276, 284 (5th Cir. 1989); *Edmonds v. Jabe*, 874 F. Supp. 730, 736 (W.D. Va. 1995) (finding conflict of interest claim was not reasonably available when only mention of conflict was in a single sentence buried in a psychiatric report prepared for sentencing). Considering Saunders' silence in the face of these duties and the absence of any indication in the trial record that a conflict might have existed, Mickens had no reason to even consider the possibility that a conflict existed. *See Edmonds*, 874 F. Supp. at 736. Furthermore, his state habeas counsel had no reason to explore the matter.

Nonetheless, and without any credible decisional support, the Commonwealth persists in asserting that Claims 5 and 6 were reasonably available to state habeas counsel because federal habeas counsel discovered the factual basis of the claim. It is charitable to call that argument frivolous because the fortuitous circumstances by which federal habeas counsel discovered the truth about Saunders' conflict prove beyond question that Mickens did not fail in his duty to inquire in the state court proceedings. *See Amadeo v. Zant*, 486 U.S. 214, 224, 108 S. Ct. 1771, 100 L. Ed. 2d 249 (1988). Mickens had no reason to suspect that Saunders would violate the disclosure obligations imposed on him by state law. Nor is there fault to be found in state habeas counsel's failure to request Hall's JDR files because they were imbued with confidentiality by state law. Federal [F. Supp. 2d 602] habeas counsel uncovered the conflict by virtue of the error of the



Clerk of the JDR Court. And, when that error was discovered, the records were taken from federal habeas counsel. They were disgorged again only by virtue of a subpoena. Thus, the factual predicate for Claims 5 and 6 simply was not available to Mickens in state court nor was it discoverable through the exercise of diligent investigation. To argue otherwise is disingenuous. On this record, Mickens has established cause, the first step for excusing his default of Claims 5 and 6.

B. Prejudice Excusing Default of Claims 5 and 6

To establish actual prejudice, Mickens "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). Where the defaulted claim involves an actual conflict of interest on the part of counsel, the prejudice inquiry incorporates the test for establishing the underlying claim. *See Williams v. French*, 146 F.3d 203, 210-13 (4th Cir. 1998), *cert. denied*, 525 U.S. 1155, 119 S. Ct. 1061, 143 L. Ed. 2d 66 (1999). Thus, it is necessary now to evaluate the underlying claims.

C. The Test For Establishing An Actual Conflict of Interest

To demonstrate that he was deprived of the Sixth Amendment right to conflict-free counsel, Mickens can proceed on one of two theories: (A) that Saunders had a potential conflict of interest that prejudiced his defense, *see Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); or (B) that "[1] an actual conflict of interest [2] adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). *See Enoch v. Gramley*, 70 F.3d 1490, 1496 (7th Cir. 1995); *United States v. Swartz*, 975 F.2d 1042, 1047 (4th Cir. 1992). Mickens proceeds on the latter theory.

1. Actual Conflict

In the context of multiple or simultaneous representations, a lawyer has an actual, as opposed to a potential, conflict of interest when the interest of the petitioner and the other client "diverge[d] with respect to a material factual or legal issue or to a course of action." [11] *Gilbert v. Moore*, 134 F.3d 642, 652 (4th Cir.) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 356 n. 3, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) (Marshall, J., concurring in part and dissenting in part)), *cert. denied*, 119 S. Ct. 103 (1998). It is often difficult to ascertain whether the clients' interests actually diverged in the context of successive representation. *Freund v. Butterworth*, 165 F.3d 839, 859 (11th Cir.) (en banc), *cert. denied*, __U.S.__, 120 S. Ct. 57, 145 L. Ed. 2d 50 (1999); *United States v. Tatum*, 943 F.2d 370, 376 (4th Cir. 1991); *United States v. Young*, 644 F.2d 1008, 1012 (4th Cir. 1981).

Keenly aware of the delicate privilege issues which often arise in successive representation cases, the Eleventh Circuit has adopted a refined version of the *Cuyler* test specifically for that sort of case. *See Smith v. White*, 815 F.2d 1401, 1406 (11th Cir. 1987).[12] The test is discussed at length in the Eleventh Circuit's recent decision in *Freund v. Butterworth*, 165 F.3d 839 (11th Cir.) (en banc), *cert. denied*, __U.S.__, [F. Supp. 2d 603] 120 S. Ct. 57, 145 L. Ed. 2d 50 (1999). In *Freund*, the court held that, in the context of successive representation, a defendant does not demonstrate a disqualifying divergence of interests unless he shows either that "(1) counsel's earlier representation . . . was substantially

[11] A potential conflict of interest exists if the interests of the defendant may place the lawyer under inconsistent duties at some time in the future. *Cuyler*, 446 U.S. at 356, n. 3, 100 S. Ct.1708.

[12] The United States Court of Appeals for the Seventh Circuit has adopted the *Smith* test for successive representation cases. *See Enoch v. Gramley*, 70 F.3d 1490, 1496 (7th Cir. 1995). This opinion refers to that test as the "*Freund* test".



and particularly related to counsel's later representation of petitioner, or (2) counsel actually learned particular confidential information during the prior representation . . . that was relevant to petitioner's later case." *Freund*, 165 F.3d at 859 (internal quotations and citations omitted). "Even proof of **both** substantial relatedness and confidential information, however, may not necessarily be enough to demonstrate 'inconsistent interests' in a successive representation case." *Id.* The situation may require the defendant to introduce, "other proof of inconsistent interests." *Id.* (quoting *Smith*, 815 F.2d at 1406).

The two scenarios described in the *Freund* test pose the most obvious risks of an actual conflict in the context of successive representation. *See United States v. Kliti*, 156 F.3d 150, 154 (2d Cir. 1998); *United States v. Young*, 644 F.2d 1008, 1012 (4th Cir. 1981). However, neither the Supreme Court nor the Fourth Circuit has restricted proof of a conflict to those two scenarios. *See, United States v. Magini*, 973 F.2d 261, 263-64 (4th Cir. 1992) (directing district court to hold an evidentiary hearing to determine whether client's and lawyer's pecuniary interests diverged). Given the gravity of the charge against Mickens and the somewhat predictable consequence of rejecting his petition, it is imperative that, through "other proof of inconsistent interests," Mickens can carry his burden under the first prong of *Cuyler*, if the interests actually diverged. In this instance, Mickens argues that Saunders' irreconcilable ethical obligations to Hall and Mickens coupled with Saunders' desire to conceal the successive representation constitute "other proof of inconsistent interests." *See infra* Sec. VI(D)(2).

2. Adverse Effect

Mickens erroneously contends that an adverse effect can be established simply by showing that "but for the attorney's actual conflict of interest, there is 'a reasonable likelihood that counsel's performance somehow would have been

different.'" *Stoia v. United States*, 22 F.3d 766, 771 (7th Cir. 1994) (quoting *Frazer v. United States*, 18 F.3d 778, 787 (9th Cir. 1994) (Beezer, J., concurring)). In fact, a petitioner must demonstrate that counsel's performance was adversely affected by the conflict. *Stoia*, 22 F.3d at 771 (noting the lapse in counsel's performance must be "contrary to the defendant's interests"). Thus, even though the petitioner is not required to demonstrate prejudice, he must show that the conflict was "deleterious" or "harm[ful]" to counsel's advocacy. *See Burger v. Kemp*, 483 U.S. 776, 785, 788, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987). A petitioner satisfies the second facet of *Cuyler* "if the attorney took action on behalf of one client that was necessarily adverse to the defense of the other or failed to take action on behalf of one because it would adversely affect the other." *Williams v. French*, 146 F.3d 203, 212 (4th Cir.1998), *cert. denied*, 525 U.S. 1155, 119 S. Ct. 1061, 143 L. Ed. 2d 66 (1999).

To prove an adverse effect, a petitioner must satisfy three elements:

> First, he must point to some plausible alternative defense strategy or tactic [that] might have been pursued. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, the petitioner need not show that the defense would necessarily have been successful if the alternative strategy or tactic had been used, rather he only need prove that the alternative possessed sufficient substance to be a viable alternative. Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, he must [F. Supp. 2d 604] establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.



*Freund*, 165 F.3d at 860. *Accord Williams*, 146 F.3d at 213 (requiring similar elements for demonstrating adverse effect in the context of multiple representation); *United States v. Tatum*, 943 F.2d 370, 376 (4th Cir.1991).

These basic principles inform the analysis of the conflict of interest claims advanced by Mickens.

D. Proof Of An Actual Conflict

The *Freund* test, with the modification that Mickens may establish an actual conflict solely through "proof of other inconsistent interests," will be applied to assess the merits of Mickens' claims. At this stage of the analysis, it is insufficient for Mickens merely to suggest what might have animated Saunders' conduct. Mickens must demonstrate, from the state court record and the evidence adduced in these proceedings, that an actual conflict of interest adversely affected Saunders' representation.

Mickens contends that he has proven the existence of actual conflict because: (1) Saunders' representation of Hall was substantially and particularly related to Saunders' later representation of Mickens; (2) Saunders' ethical duty of loyalty to Hall, and Saunders' own self-interest were irreconcilable with his duty to zealously represent Mickens; and (3) Saunders' actually learned particular confidential information during his representation of Hall that was relevant to Mickens' case. *See Freund v. Butterworth*, 165 F.3d 839, 859 (11th Cir.) (en banc), *cert. denied*, __U.S.__, 120 S. Ct. 57, 145 L. Ed. 2d 50 (1999).

1. Substantial Relatedness

Substantial relatedness exists when "'the present action and the past representation concern the **very same** subject matter'" or when the prior representation concerned the "'same criminal transactions' and 'same events' at issue in defendant's case". *Freund v. Butterworth*, 165 F.3d 839, 864 (11th Cir.) (en banc) (quoting *Kraft, Inc. v. Alton Box Board*

*Inc.*, 659 F.2d 1341, 1345 (1981) and *United States v. Martinez*, 630 F.2d 361, 362 (5th Cir. 1980)), *cert. denied*, 120 S. Ct. 57, 68 U.S.L.W. 3223 (Oct. 4, 1999). Saunders' representation of Hall was very limited in scope and duration. Specifically, Saunders represented Hall on a concealed weapons charge and an assault on his mother. The representation did not arise out of the "very same subject matter" as the charges facing Mickens. Nor did it involve the same criminal transactions or events. Mickens strains to find a correlation by arguing that the location of Hall's arrest for the concealed weapon charge indicates that he was a prostitute and thus consented to the sexual activity with Mickens. [13] (Pet.'s Resp. to Feb. 2, 1999 Order at 22.) Hall's arrest, within a mile or so of his residence, even if it was in a high crime area, does not suggest that he was a prostitute, much less that he consented to have sex with Mickens. (5/26/93 Tr. T. at 562; 1/13/99 Hr. T. at 201.) Mickens also contends that "[b]y its very nature the previous representation of the murder victim is substantially related to the defense of the person accused of the murder." (Pet.'s Resp. to Feb. 2, 1999 Order at 13.) The weight of authority refutes that contention. *See Crisp v. Duckworth*, 743 F.2d 580, 588 (7th Cir. 1984) (finding no conflict when defense counsel previously represented murder victim in unrelated criminal action); *Kirkpatrick v. Butler*, 870 F.2d 276, 284 (5th Cir. 1989) (finding no conflict [F. Supp. 2d 605] where defense counsel had friendship with, and had in the past represented, members of murder victim's family); *Moseley v. Scully*, 908 F. Supp. 1120 (E.D. N.Y. 1995) (finding no actual conflict where counsel previously represented murder victim on

[13] Hall was charged with carrying a concealed weapon at 27th and Marshall streets in Newport News. (Probable Cause Statement, United States District Court Clerk's Record # 23.) The arrest warrant for the charge listed Hall's address at 83-28th Street, # D-4, Newport News, Virginia. The evidence does not indicate that the intersection of 27th and Marshal streets was an area frequented by prostitutes.



unrelated charges); *Dixson v. Quarles*, 627 F. Supp. 50 (E.D. Mich.) (finding no actual conflict even though defense counsel previously represented the murder victim), *aff'd* 781 F.2d 534, 535 (6th Cir. 1985). Mickens has failed to demonstrate a correlation, much less a substantial and particular relationship, between Saunders' representation of Hall for assault and possession of a concealed weapon and his representation of Mickens on attempted forcible sodomy and capital murder charges.

2. Divergent Ethical Interests

Mickens next argues that Saunders' ethical duties, and his desire to conceal the breaches of those duties, left Saunders hopelessly adrift in a fog of torn and conflicting loyalties. *See United States v. Tatum*, 943 F.2d 370, 377 (4th Cir. 1991). Mickens contends that the determination whether there was an actual conflict under the Sixth Amendment is "inextricably intertwined" with an analysis of Saunders' ethical duties and the breach of those duties. Certainly prevailing norms of practice, as reflected in the state codes of professional responsibility, are useful guides for evaluating the ethical obligations of counsel and how a competent lawyer must resolve potential conflicts. *See Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). At the threshold, it is now settled that "[t]he effective performance of counsel requires meaningful compliance with the duty of loyalty and the duty to avoid conflict of interests can lead to ineffective representation." *Tatum*, 943 F.2d at 375. However, the "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *Nix v. Whiteside*, 475 U.S. 157, 165, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986); *see Lightbourne v. Dugger*, 829 F.2d 1012, 1023 n. 12 (11th Cir. 1987). "[U]ntil a defendant shows that his counsel **actively** represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective

assistance." *Cuyler*, 446 U.S. at 350, 100 S. Ct. 1708 (emphasis added).

When Saunders was appointed to represent Mickens in the capital murder of Hall, Saunders was obligated to consider the ethical problems posed by the appointment because Saunders' duty to zealously represent Mickens might be compromised by his loyalty to Hall, including his obligation to preserve Hall's secrets and confidences. *See* Va. Code Prof'l Responsibility DR:4-101, EC:4-6, Canon 7 (Michie 1992).[14] Moreover, even if Saunders did not believe that the representation would ripen into an actual conflict of interest, the choice was not his alone. *Id.* EC:5-19. Mickens contends that his interests were further compromised by Saunders' attempts to conceal his ethical breaches. However, the evidence shows that, regrettably, Saunders never struggled with the ethical issues envisioned by Mickens. (1/13/99 Hr. Tr. at 220, 228.)

To begin, the record here reflects that, as far as Saunders was concerned, his allegiance to Hall, "[e]nded when I walked in the courtroom and they told me he was dead and the case was gone." (1/13/99 Hr. Tr. at 156-7, 218). As Mickens' counsel, Saunders coldly viewed Hall not as former client, but rather as "a demographic situation which was disastrous as far as Mickens was concerned." *Id.* at 156. That view is remarkably wrong given that Saunders was obligated to preserve any confidence obtained from Hall. *Swidler & Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081, 2086, 141 L. Ed. 2d 379 (1998).

[F. Supp. 2d 606] However, Saunders testified that his representation of Mickens was not hampered by the duty to

[14] Under Virginia law, even the fact that there had been juvenile charges against Hall as well as the information in the charging documents arguably constituted confidential information. *See* Virginia Code Ann. § 16.1-305 (Michie Supp. 1992).



preserve Hall's purported confidences. Of course, for purposes of the issue under consideration, the court "accords great weight to a lawyer's perception of a conflict," because it is tasked with evaluating what considerations actually animated Saunders' actions, rather than what obligations should have influenced his actions. *United States v. Young*, 644 F.2d 1008, 1014 (4th Cir. 1981). Thus, whether particular information is confidential under Virginia law while important, is not dispositive of whether Saunders deemed the information to be confidential.

According to Saunders, he did not perceive that his previous representation of Hall presented an actual conflict in representing Mickens. (1/13/99 Hr. T. at 108-11, 214, 223, 228; 12/23/98 Dep. at 86.) That perception was animated by Saunders' conclusion that he did not obtain any confidential information from Hall (1/13/99 Hr. T. at 218-19), and that "[n]othing I knew or did or had anything to do with Mr. Hall had anything to do with [Mickens'] case." *Id.* at 228. Without condoning the inexcusable failure to disclose the previous representation of Hall, the Court concludes that, as a factual matter, Saunders did not believe that any "continuing duties to [a] former client[ ] [might] interfere with his consideration of all facts and options for his current client." *United States v. Tatum*, 943 F.2d 370, 376 (4th Cir. 1991).

3. Relevant Confidential Information

Although it is inconceivable that Saunders obtained no confidential information from Hall, (1/13/99 Hr. T. at 219), the record here confirms that Saunders did not learn any confidential information from Hall that was relevant to Mickens' defense either on the merits or at sentencing. *Freund v. Butterworth*, 165 F.3d 839, 865 (11th Cir.) (en banc), *cert. denied*, __U.S.__, 120 S. Ct. 57, 145 L. Ed. 2d 50 (1999). Saunders met with Hall on one occasion for a total of fifteen to thirty minutes. (1/13/99 Hr. T. at 98.) Through his representation of Hall, Saunders learned that: (a) Hall had

been charged with carrying a concealed weapon at the intersection of 27th Street and Marshall in Newport News; (b) Hall's mother had pressed charges against him for assault, but she was not interested in prosecuting the case (1/13/99 Hr. T. at 155); and (c) Hall was not living with his mother at the time of his death. As discussed fully below, that information was irrelevant to Mickens' defense.[15]

E. Adverse Effect: The Purported Manifestation of the Conflict

Mickens asserts that Saunders' conflict caused: (1) his failure to raise a consent defense; (2) the failure to investigate or raise any negative information about Hall; (3) the failure to engage in meaningful plea negotiations; and (4) the failure to apprise the sentencing court of Hall's pending charges or his strained relationship with his mother.[16] Each of these will be measured against the *Freund* test for ascertainment of an adverse effect (see p. 603-04 *supra*).

1. Consent Defense

Mickens asserts that the conflict foreclosed presentation of the defense that Hall was killed during a sexual encounter to which he had consented. That defense, [F. Supp. 2d 607] if successful, would have precluded capital punishment. Mickens points to the following facts that made consent a plausible defense strategy: (a) there were no "defensive" stab

[15] For example, Hall's criminal history might have had some relevance to Mickens' case, if Mickens' testimony had not foreclosed any theory of self-defense.

[16] By Order entered February 2, 1999, the Court stated, "[r]eview of the adverse affect prong, for the habeas petition will be limited to instances listed" "in separately numbered paragraphs" in the brief in response to that Order. Accordingly, the Court deems Mickens to have abandoned claims of adverse affect alleged in the initial petition but not realleged in the response to the February 2, 1999 Order.



wounds; [17] (b) there was no evidence that Hall was forced to the secluded area where he was found; (c) there were rumors that Hall was a male prostitute and that the area where Hall's body was found was a known gathering place for homosexuals; (d) there was no blood mixed with Mickens' semen stain on the mattress; and (e) the mattress where Hall's body was found had been used for sexual activity in the past.

Even if it is assumed that those five facts would have supported a consent defense, the record shows that other facts foreclosed presentation of consent as a plausible alternative defense strategy. First, Saunders knew that there also was evidence that Hall sometimes went to the area where he was murdered simply to watch the water. (1/13/99 Hr. T. at 174, 205; 12/23/98 Dep. at 71.) Second, there were blue marks on Hall's neck which evinced use of a choke hold on Hall, a circumstance inconsistent with consent. (8/20/93 Hr. Tr. at 25; 12/23/98 Dep. at 70.) Third, the bloody transfer stains on the back of Hall's thighs indicated that the attacker stabbed Hall before or during the attempted sexual activity, thereby making consent a rather implausible alternative theory. As Keeling, Mickens' other counsel, remarked, "I would imagine that when the choking of the victim or the stabbing of the victim started happening that [any] consent would have been revoked." (1/13/99 Hr. T. at 33.) Finally, and most importantly, Mickens never suggested that consent was a viable line of defense (12/23/98 Dep. at 67, 68, 73). To the contrary, Mickens repeatedly professed that he had no involvement with Hall in any way. That persistent

[17] Leah Bush, the medical examiner testified that,

> [d]efense wounds are to areas of the body in a person who sees the injury coming and raises a portion of the body in a protective manner . . . . Oftentimes, the backs of the arms of or hand or in a case of a sexual or rape-type of assault also present [sic] on the legs if the victim were to raise up their knees to ward off a blow or attack.

(5/26/93 Tr. T. at 510.)

representation by Mickens encouraged Saunders to conclude that a consent defense did not exist. (1/13/99 Hr. Tr. at 68-70, 77). Mickens repeatedly informed counsel that he did not even know Hall and that he had nothing to do with the crime. (6/2/93 Tr. T. at 885; 8/20/93 Hr. Tr. at 12, 37; 1/13/99 Hr. Tr. at 77, 89, 135, 183.) And, Mickens insisted on testifying to that effect at his trial and at sentencing. (1/13/99 Hr. Tr. at 69, 224.) Hence, Saunders was compelled to construct a defense that distanced Mickens from Hall and the murder scene. *Id.* at 77-78, 84. Saunders discarded consent as a strategy not because of any loyalty to Hall, but because neither the facts nor Mickens' testimony was compatible with such a strategy.[18] *Id.* at 68, 156-57, 231. An adverse effect cannot be found where a lawyer relies on what his client has told him and that reliance forecloses a line of defense. *See Royal v. Taylor*, 188 F.3d 239, 248-49 (4th Cir. 1999) (citing *Barnes v. Thompson*, 58 F.3d 971, 979 (4th Cir. 1995)); *Parker v. Parratt*, 662 F.2d 479, 484 (8th Cir. 1981) (concluding defense counsel could not be blamed for offering the defense sworn to by both defendants).

2. Failure to Ascertain and Use Information About Hall

Mickens asserts that an adverse effect of Saunders' conflict is manifest in his failure to investigate and to use negative information about Hall. This alternative defense strategy is based on the premise that negative information about the victim of a crime can be, and often is, used to mitigate the severity of the act of murder.

[F. Supp. 2d 608] Of course, adoption of that alternative strategy would have been inconsistent with Mickens' profession of innocence and his purported regret at Hall's

[18] At the evidentiary hearing, Keeling explained that he never raised the issue of consent with Mickens because Mickens insisted that he was not involved in the crime. (1/13/99 Hr. T. at 68.)



passing. "I'll pray each and every day that [Hall] may rest in peace." (6/4/93 Hr. T. at 1090 (sentencing hearing)). Saunders carried that standard during his closing argument, emphasizing the sanctity of human life and expressing regret for Hall's death. (2/7/96 Hr. T. at 479-80; 1/13/99 Hr. T. at 157.) Saunders eschewed an attack on Hall, the young victim of a horrible crime, because it would have appeared disingenuous and would have diminished the value of Mickens' life in the eyes of the jury. (1/13/99 Hr. T. at 112, 156-58; 12/23/98 Dep. at 76, 77).

Mickens' papers do not outline the precise contours of this alternative strategy, but it appears to be based on the premise that investigation would have shown that Hall was a neer-do-well, male prostitute who had been charged with carrying a weapon and assaulting his own mother. However, the record offers no support for the existence of evidence which would have made that strategy either plausible or viable. Even diligent investigation by federal habeas counsel has uncovered nothing but rumor about Hall's supposed life as a male prostitute. But, even if that could have been proved, evidence on that point would be useful only by mounting a consent defense which was foreclosed by Mickens' insistance that he did not even know Hall or by pointing to another perpetrator, for which there was no admissible support either. The propensity of that approach to backfire made it an unreasonable alternate strategy or tactic at sentencing.

The evidence that Hall had been charged with carrying a weapon had no utility as an alternate strategy, even if it were admissible (which is highly doubtful). The evidence that Hall had been charged with assaulting his mother would have been useful insofar as it could be argued to discredit the mother's professions of grief tendered to the probation officer for inclusion in the victim impact statement. Of course, that approach was fought with the risk of unintended consequences as well. In any event, even though admissible

for impeachment, evidence on that point cannot be considered to present a plausible or viable alternate strategy because the assault was of a relatively minor nature and its impeaching effect would be de minimus.

Even if the negative information about Hall could be considered as raising a plausible, viable strategy, the record here dispels the contention that the failure to use negative information about Hall is attributable to any conflict of interest on the part of Saunders. This is particularly evident in the conduct of Saunders' co-counsel, Warren Keeling, who was in charge of the sentencing phase of Mickens' trial. (1/13/99 Hr. T. at 78.) In preparation for the trial, Keeling read the newspaper article, (Pet.Ex. l, attached to initial federal petition), which reported that Hall had been charged with assaulting his mother; that the police had "picked him up" for carrying a weapon; that Hall had been kicked out of his mother's house; and that a social worker was involved in Hall's life. (1/13/99 Hr. T. at 61.) At the time, Keeling was looking for evidence about Hall that could be used at Mickens' sentencing. *Id.* at 57. Keeling did not deem any of the information reported in the newspaper article to be relevant to that end because he did not pursue it. *See Freund v. Butterworth*, 165 F.3d 839, 868 (11th Cir.) (en banc) (noting counsel's representation was not tainted by conflict, since conflict-free counsel would have chosen the same defense), *cert. denied*, __U.S.__ , 120 S. Ct. 57, 145 L. Ed. 2d 50 (1999). Here, Keeling, who is free of conflict, followed the same course as that taken by Saunders.

3. Plea Negotiations

Another plausible alternative strategy would be a plea of guilty with a sentence other than death. And, that certainly would have been a reasonable alternative [F. Supp. 2d 609] under the facts. However, the absence of plea negotiations was attributable to the decision of the Commonwealth's Attorney who advised that there was "[n]o way" he would



allow a plea in the case. (1/13/99 Tr. T. at 158; 12/23/98 Dep. at 80-81.) There is nothing in the record to suggest that the plea negotiations were not pursued because Saunders previously had represented Hall. Of course, it is possible that evidence of a consensual encounter or adverse information about Hall might have prompted a willingness to negotiate, but, as explained above, the record discloses that strategies based on those concepts were neither plausible nor viable.

4. Failure to Apprise the Sentencing Court of Hall's Pending Charges and Hall's Strained Relationship With His Mother

After the second jury had fixed Mickens' sentence at death, but before the formal imposition of the sentence of death, a post-sentence report was prepared for the judge who ultimately sentenced Mickens to death. *See* Va. Code Ann. § 19.2-264.5 (Michie 1990). That report contained the following information:

> The victim's mother stated as a result of this offense, her marriage broke up. She stated also the offense shattered her world. She stated "all I lived for was that boy." As a result of the offense, the victim's mother stated she dropped out of school, she lost the potential of a good income, that her daughter became depressed for six months, and her husband went into the hospital for six months one month after Timothy died. She (mother) was left to deal with both her daughter's depression and her husband's illness.
>
> The victim's mother stated "I'll never be over the way my son was killed."
>
> (Circuit Court for the City of Newport News, Clerk's Record, Post-sentence Report prepared 3/6/96.)

Mickens argues that Saunders could have used information gleaned from his representation of Hall to rebut the mother's

statements that she was overwrought at the death of her son, but that his previous representation of Hall kept that attack on Hall's mother out of the sentencing proceeding. Mickens has not established that, in the context of the sentencing hearing required by Va. Code Ann. § 19.2-264.5 hearing, a tactic of that sort "possessed sufficient substance to be a viable alternative." *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir.) (en banc), *cert. denied*, __U.S.__, 120 S. Ct. 57, 145 L. Ed. 2d 50 (1999).

Under Va. Code Ann. § 19.2-264.5, when a jury has fixed a defendant's punishment at death, the trial court, before imposing sentence, must require a thorough investigation by a probation officer into the defendant's history and background so that the court "may be fully advised as to whether the sentence of death is appropriate and just." After considering the report, the court, "upon good cause shown," may set aside the death sentence and impose a sentence of life imprisonment. *Id.* The Supreme Court of Virginia has emphasized that, in recommending death, "the jury's verdict is not merely a recommendation to be followed or rejected by the trial court at its discretion." *Frye v. Commonwealth* 231 Va. 370, 345 S.E.2d 267, 286 (1986). Although the Supreme Court of Virginia has not posited a concise definition of what constitutes "good cause" in the capital sentencing context, the Court's consistent refusal to find good cause attests to the exacting nature of the standard. *See Hedrick v. Commonwealth*, 257 Va. 328, 513 S.E.2d 634, 641 (1999); *Roach v. Commonwealth*, 251 Va. 324, 468 S.E.2d 98, 113 (1996); *Chandler v. Commonwealth*, 249 Va. 270, 455 S.E.2d 219, 226-27 (1995); *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422, 438 (1985); *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271, 285 (1983).

Considering the difficulty of showing good cause under Virginia law and considering [F. Supp. 2d 610] that Mickens has failed to show how impeaching Hall's mother's assertions



of grief would have furthered a finding of good cause, it cannot be said that the tactic, if employed, would have met the test of viability. And, in any event, the tactic was inconsistent with Mickens' expressions of regret for the pain that Hall's death caused his mother. (3/29/96 Hr. T. at 22).

Thus, Mickens has failed to show that the purported conflict resulted in Saunders foregoing a plausible alternate strategy or tactic that was reasonable under the facts. And, perhaps more importantly, even if it is assumed that there was a plausible, viable alternate strategy that Saunders failed to pursue, the record shows no link between the failure to pursue it and the asserted conflict.

F. Adverse Effect: General

Wholly apart from the question of alternate strategies foresworn, Mickens raises two other reasons why the conflict adversely affected Saunders' representation. First, Mickens contends that Saunders' investigation was deficient. Second, Mickens argues that the failure of Saunders to pass along information to his co-counsel, Warren Keeling, was per se an adverse effect. Those contentions will be considered next.

1. Deficient Investigation

Mickens asserts that, but for the conflict, Saunders would have reviewed Hall's juvenile file and would have pursued leads provided to the police by Bernard Gordon, Alicia Thrash, and Charity Fleming. According to Mickens, had these basic tasks been performed, Saunders would have uncovered evidence useful for his defense.

Saunders testified that he never considered reviewing Hall's juvenile file because he believed that file did not contain any information pertinent to Mickens' case. That, of course, misses the point because a reasonable investigation would have included an examination of Hall's past, including his JDR Court file (assuming that could had been accomplished under state law). Moreover, without reviewing

the file, Saunders' view on that topic is speculative. But, the Court's review of Hall's juvenile file confirms that, on that score, Saunders' guess was a correct one.

The explanation given by Saunders for not pursuing the information contained in the police files because to do so would have been a waste of time is not so readily dispatched. Saunders says that he reviewed the police files and took notes of their contents. Those notes reflect that Bernard Gordon (the father of the family with whom Hall lived at the time of his death) told the police that "nothing much else of use—except that Tim [Hall] had been ducking three guys [he] owed money to for about three months. They came to the apartment at least once." (Pet.'s Ex. 2B at 1/13/99 Hr. T. at 127.) Those notes, of course, present the prospect that Hall's creditors might have killed him. Saunders testified that he intended to talk to Gordon, but that Gordon died before Saunders was able to interview him. (1/13/99 Hr. T. at 128.) Although Gordon might have provided information suggestive of another perpetrator, the failure to secure his knowledge before he died was not attributable to a conflict. That, however, does not explain why Saunders did not pursue the same lead from other sources. The lead should have been pursued because, given Mickens' position that he did not know Hall, the lead suggested that there might have been evidence of an alternate perpetrator. The record discloses no reason for the failure to follow that lead other than Saunders' lack of perspicacity or perhaps indolence. Neither of those reasons bespeaks that he failed to act because of his previous representation of Hall.

Next, Mickens faults Saunders for failing to pursue information which Alicia Thrash and Charity Fleming provided to the police which, according to Mickens, suggested that Hall was being harassed by [F. Supp. 2d 611] a male prostitute on the night of the murder. (P.'s Resp. to Feb. 2, 1999 Order at 29.) Evidence of that sort also might have



allowed counsel to argue the existence of another perpetrator. Alicia Thrash was Hall's friend and Hall intended to attend Thrash's sixteenth birthday party on the night that he was murdered (Saturday, March 28, 1992). After Hall was murdered, Thrash spoke to "Stephanie," Hall's ex-girlfriend. Stephanie told Thrash that she had talked to Hall on the night of his death. Saunders' notes reflect that on April 10, 1992, Thrash provided the following statement to the police:

> Everything got real messed up cause when we went to the wake [for Hall], this girl named Stephanie said Timmy [Hall] had called her Saturday night, all scared and nervous, talking about this prostitute was harassing him, saying all kinds of stuff, that he was harassing him over something or other, & then she told him to come pick her up, and he said that he was at the end of 29th Street, that is where he said by the construction office, that's where he was at. & she said he called her & told her to come pick him up like that.

(Pet.'s Ex. 2A at 1/13/99 Hr. Tr. at 124-25.) That information, of course, presented the possibility that Hall was killed in a dispute with a male prostitute.

On the other hand, Saunders also had access to Charity Fleming's statement to the police which indicated that Thrash's secondhand account of the events was less than reliable. According to Saunders' notes, Fleming "supposedly talked to Tim [Hall] on Sunday around 6-7 and wanted her or Stephanie (Ex-girlfriend) to pick him up at 29th St either on [the] corner or at Basic [Construction] because of problems he was having with a girl he picked up on Washington Ave. [a] couple of days before. (this could be just Bull/ or she could have the day wrong)." (Pet.'s Ex. 2B 1/13/99 Hr. T. at 127-28) (emphasis added). Fleming's account of the conversation indicates that Hall's request for a ride came on Sunday (the day after Hall's death) and was prompted by trouble that Hall was having with a girl, not a male prostitute.

Both Thrash and Fleming offered leads which may have made it more difficult for the Commonwealth to prove that Mickens was the murderer because they pointed to an alternate killer. However, Saunders' rejected the Thrash/Fleming lead because he did not believe that the lead was credible (12/23/98 Dep. at 52-54) for the reason that Fleming said that she spoke to Hall on Sunday, the day after Hall was killed. At the same time, Saunders concluded that the Thrash/Fleming lead pointed to an angry female as the perpetrator (1/13/99 Hr. T. at 131-32), and, therefore, concluded, in light of the overtly homosexual nature of the crime, that none of the leads suggested by Gordon, Thrash or Fleming could identify a viable alternative perpetrator of the crime.[19] *Id.* Those reasons for refusing to pursue evidence which pointed to the existence of an alternative perpetrator are not defensible, especially where, as here, a client's life is on the line. Additionally, Fleming's assertion that Hall was still alive on Sunday was hardly inconsequential to Mickens' defense considering that the Commonwealth's Attorney conceded, at Mickens' preliminary hearing, that it was not "going to be able to determine the precise date that this homicide took place." (P.'s Ex. 5 from Federal Evidentiary Hearing, at 59.). Evidence of that sort could have helped to undermine the relevance of the testimony of Vincent West and Bruce Mitchell that Mickens was lurking around the area where Hall was murdered on Saturday night.

However, Mickens must do more than show that Saunders could, or should, have pursued a promising lead. He must also establish some link between the asserted actual conflict and the decision to forego [F. Supp. 2d 612] further investigation of the lead. *See Freund v. Butterworth*, 165 F.3d 839, 860, 869 (11th Cir.) (en banc), *cert. denied*, __U.S.__,

[19] Saunders spoke to Thrash over the telephone, but did not question her regarding her statement about a prostitute harassing Hall. (1/13/99 Hr. T. at 242-43.)



120 S. Ct. 57, 145 L. Ed. 2d 50 (1999); *Wilson v. Moore*, 178 F.3d 266, 281 (4th Cir. 1999); *Stoia v. United States*, 109 F.3d 392, 397 (1997) (rejecting conflict claim where petitioner "failed to show the connection between any actual conflict of interest and any adverse effect on" petitioner's defense). In other words, Mickens has "the burden of proving through a preponderance of the evidence" that Saunders "would have" pursued the Thrash and Fleming leads "but for" Saunders' professional relationship with Hall. *Freund*, 165 F.3d at 869. Mickens may carry this burden by showing that pursuit of these leads "was inherently in conflict with" Saunders' "other loyalties or interests" or by other probative evidence that he did not pursue the leads because of those interests. *Id.* at 860. This, he has failed to do.

In sum, there is an absence of convincing evidence connecting the Thrash and Fleming leads with Saunders representation of Hall. There is no suggestion that Thrash, Fleming or Stephanie, Hall's ex-girlfriend, were involved, even tangentially, in the concealed weapons and assault charges as to which Saunders served as counsel to Hall. Nor has Mickens produced any plausible evidence that, during his representation of Hall, Saunders suspected that Hall was involved in prostitution.

When all is said, the Court credits Saunders' testimony that he did not refrain from taking any actions for Mickens because of his earlier representation of Hall. (1/13/99 Hr. T. at 219, 240-41); *Freund*, 165 F.3d at 869. And, Mickens has failed to show that pursuit of the Thrash and Fleming leads was inherently in conflict with, or was not undertaken because of, Saunders' loyalty to Hall or because of Saunders' own interests.

2. Saunders' Failure to Advise Keeling of Information About Hall

While it certainly is reasonable (and expected) that counsel would share with co-counsel that he previously had

represented the victim, it is undisputed that Saunders never told Keeling about his previous representation of Hall.[20] Mickens asserts that Saunders failed to share the fact of his representation of Hall and whatever information that he had about Hall because Saunders feared that his conflict would be discovered and that he would be removed as Mickens' counsel in the capital case, thereby forfeiting the prestige and financial benefits which are associated with serving as counsel in this case.

Virginia's scheme for compensating lawyers in capital cases, parsimonious as it is, does not support a finding that Saunders was motivated by financial gain. And, although some publicity, and hence some prospect of luring clients, often attends representation of a client in a notorious case, the record does not disclose that Mickens' case was of that ilk, notwithstanding that, like most murders, substantial publicity surrounded it.

After viewing Saunders' testimony, the Court is unconvinced that such selfish "loyalties or interests" existed, much less motivated Saunders' silence. (1/13/99 Hr. T. at 93, 102-4). Rather, this lapse of communication is attributable to Saunders' myopic view of the potential conflicts and utter insensitivity to the ethical issues raised by the facts. (*Id.* at 95, 108-11, 220, 227-28.) Saunders did not believe the Hall representation was a source of relevant information or potential conflicts for the Mickens case. Thus, as far as he was [F. Supp. 2d 613] concerned, his perception ended the matter for all concerned: his client, the court and co-counsel.

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[20] According to Saunders, he assumed that Keeling (and everyone else) knew that he had represented Hall. (1/13/99 Hr. T. at 105.) That assertion lacks evidentiary support and, considering the secrecy attached to juvenile proceedings and a lawyer's obligations of confidentiality, the explanation borders on the absurd. Indeed, Saunders could not recall mentioning to anyone, at the time he represented Mickens, that he had previously represented Hall. *Id.* at 107.



The record does not demonstrate that Saunders' silence, *albeit* inexcusable, was attributable to Saunders' self-interest. *See Williams v. French*, 146 F.3d 203, 212-13 (4th Cir.1998), *cert. denied*, 525 U.S. 1155, 119 S. Ct. 1061, 143 L. Ed. 2d 66 (1999).

## VII. FAILURE OF THE COURT TO CONDUCT AN INQUIRY INTO THE PURPORTED CONFLICT

As a separate, but related ground of relief, Mickens contends, relying on *Wood v. Georgia*, 450 U.S. 261,101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981), that he is entitled to a new trial because JDR Court Judge Foster removed Hall's criminal case from the docket, and shortly thereafter, without conducting any inquiry, appointed Saunders to represent Mickens on the charges arising out of Hall's murder. In *Wood*, the Supreme Court *sua sponte* raised an attorney conflict of interest claim. The Court concluded that "the **possibility** of conflict was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further." *Id.* at 272, 101 S. Ct. 1097 (emphasis added). However, the Court could not be sure whether counsel was adversely affected by a conflict. Consequently, the Court remanded the case for a hearing to determine whether an actual conflict existed and, if so, whether the right to independent counsel had been waived. *Id.* at 273-74, 101 S. Ct. 1097.

Mickens cites a footnote in *Wood* for the proposition that the absence of any inquiry by Judge Foster requires the reversal of his conviction. That footnote reads:

> Justice White's dissent states that we have gone beyond the recent decision in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). Yet nothing in that case rules out the raising of a conflict-of-interest problem that is apparent in the record. Moreover, Sullivan mandates a reversal when the trial court has

> failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' *Id.* at 347, 100 S. Ct. 1708

*Wood*, 450 U.S. at 272 n. 18, 101 S. Ct. 1097 (emphasis in original).

The Commonwealth responds that the JDR Court did not try Mickens and thus is not the "trial court" charged with a duty to inquire under *Wood*. That argument, however, is not grounded on authority which supports the proposition that only the court that actually tries the defendant is charged with making such an inquiry. Rather, precedent and common sense dictate that the duty to inquire into apparent conflicts arises before the case winds its way to the particular court and judge tasked with conducting the defendant's trial. *See Holloway v. Arkansas*, 435 U.S. 475, 489-90, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) (emphasizing the importance of conflict free counsel in pretrial proceedings, including plea negotiations); *Wilson v. Morris*, 527 F. Supp. 422 (C.D. Ill. 1981) (concluding that the preliminary examination judge is charged with making inquiry when apprised of particular conflict)' *rev'd on other grounds*, 724 F.2d 591 (7th Cir. 1984) (en banc) (however that court's duty to perceive the conflict is qualified by its limited role); *Cf. Carter v. Commonwealth*, 11 Va.App. 569, 400 S.E.2d 540, 543 (1991) (reversing conviction for court's failure to initiate *Wood* inquiry when probable risk of conflict was brought to its attention during pre-trial proceedings). Thus, the duty to inquire into particular conflicts extends to the JDR Court in this instance because it appointed Mickens' counsel.

Moreover, the record before Judge Foster presented special circumstances of an apparent possible conflict which required judicial inquiry. On Friday, April 3, 1992, Judge Foster removed the assault and concealed weapons charges against Hall from the docket, noting that the defendant was deceased. (*Commonwealth v. Hall*, No. J.40845-2, 3, (Newport News



JDR [F. Supp. 2d 614] Court Apr. 3, 1992.)) Judge Foster's handwritten order dismissing the charges was entered directly upon the individual docket for Hall's juvenile charges. That docket entry consisted of a single page which set forth Hall's full name, date of birth, an abbreviated history of the proceedings, the charges, and the identity of his appointed attorney, Bryan Saunders. *Id.* Judge Foster entered the order removing Hall's case from the docket before the case was called. (1/13/99 Hr. T. at 96-97.) And, Saunders testified that he learned from some unidentified person (either in the courthouse or in the courtroom) that the charges against Hall had been dismissed because Hall was dead. *Id.* at 96-97, 218. There was no evidence that Saunders appeared before Judge Foster on the date that the charges against Hall were dismissed, Friday, April 3, 1992.

However, on Monday, April 6, 1992, the next business day, Judge Foster appointed Saunders to represent Mickens in the capital murder of Hall. (Newport News Circuit Court Record at 5.) Mickens' arrest warrants, which appear to have been before Judge Foster when she appointed Saunders, charged that "on or about March 30, 1992" Mickens murdered "Timothy Jason Hall, white male, age 17, by stabbing, and during the commission of an abduction, and sodomy as well as robbery". *Id.* at 4. At that time, Judge Foster knew, or should have know, that Saunders was being appointed to represent Mickens on charges of murdering the juvenile Saunders recently represented.

Certainly, on Monday, April 6, 1992, Judge Foster connected, or had the capacity to connect, the juvenile, capital murder victim, Timothy Jason Hall with the deceased juvenile defendant whose case she had removed from her docket the previous Friday. The heinous nature of the crime and the publicity it received make it difficult to accept that the connection would have escaped Judge Foster's notice. (1/13/99 Hr. T. at 36.) In selecting counsel for Mickens, the

judge was no doubt aware that Mickens faced charges as to which it might be necessary to counter "evidence about the victim and about the impact of the murder on the victim's family", at least at the penalty phase of the case. *See Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). In light of that prospect, Judge Foster should have recognized the potential conflict in appointing the attorney who represented the victim on criminal charges at the time of his death, to represent the capital defendant at sentencing. The failure to do so was error under *Wood*.[21]

However, just as in *Wood*, the failure to inquire into a possible conflict does not require reversal. *Wood v. Georgia*, 450 U.S. 261, 273-74, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981). Properly understood, the trial court's duty to inquire into known or obvious conflicts of interest "is a reflection of the fact that absent an inquiry, the record will demonstrate that a particular conflict existed in violation of the Sixth Amendment. Unless a judicial inquiry rebuts the conclusion otherwise compelled by the circumstances, relief must be granted." *Wilson v. Morris*, 724 F.2d 591, 594 (7th Cir. 1984) (en banc). Thus, where, as here, further judicial inquiry reveals that potential conflict never ripened into an actual conflict, the petitioner is entitled to no relief. *See United States v. Young*, 644 F.2d 1008, 1013 (4th Cir. 1981) (remanding for an inquiry into whether an actual conflict [F.

[21] Then, on July 17, 1992, Judge Foster conducted the preliminary hearing on the charges against Mickens. (Newport News Circuit Court Clerk's Record at 2 and 4.) At that hearing, the Commonwealth presented twelve witnesses and more than one hundred pages of testimony in support of its case. (P.'s Ex. 5 from 1/13/99 Hr.) That evidence afforded Judge Foster with an overview of the known circumstances surrounding Hall's death. At the conclusion of the Commonwealth's evidence, Judge Foster found probable cause to certify a charge of attempted forcible sodomy and capital murder during the commission of attempted forcible sodomy to the grand jury. *Id.* at 130. Judge Foster found no probable cause on the charges of abduction with intent to defile and robbery.



Supp. 2d 615] existed in successive representation), *appeal after remand*, 677 F.2d 381, 383 (4th Cir. 1982). *See also Garcia v. Bunnell*, 33 F.3d 1193, 1199 (9th Cir. 1994); *Boysaw v. Deans*, No. 89-7794, 935 F.2d 267, 1991 WL 89923, at *5 n. 1 (4th Cir. May 31, 1991); *Sutton v. Murray*, No. 88-7192, 881 F.2d 1070, 1989 WL 87660 at * 1 (4th Cir. Aug. 1, 1989); *Wilson v. Morris*, 724 F.2d 591, 594 (7th Cir. 1984) (en banc); *United States v. Winkle*, 722 F.2d 605, 611-612 (10th Cir. 1983); *Brien v. United States*, 695 F.2d 10, 15 n. 10 (1st Cir. 1982); *United States v. Green*, 680 F.2d 183, 191-92 n. 12 (D.C.Cir. 1982); *Cox v. Norris*, 958 F. Supp. 411, 418 (E.D. Ark. 1996); *Bonin v. Vasquez*, 807 F. Supp. 589, 606 (C.D. Cal. 1992); *In Re Richardson*, 100 Wash.2d 669, 675 P.2d 209, 215 (1983). *But see Ciak v. United States*, 59 F.3d 296, 302 (2d Cir. 1995) (applying automatic reversal rule).

Judge Foster was not relieved of her duty to inquire into the apparent possible conflict presented here simply because Mickens' trial was to be conducted in another court or because some of her chargeable knowledge stemmed from a separate criminal matter. However, the "mere possibility of a conflict is insufficient to impugn a criminal conviction." *Cuyler v. Sullivan*, 446 U. S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). As explained elsewhere in the opinion, the possible conflict of interest presented by Saunders' successive representation of Hall and Mickens never ripened into an actual conflict nor was Saunders' advocacy impaired thereby. Thus, Mickens has not shown that the shortcomings of court and counsel alleged in Claims 5 and 6 "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982) (describing standard for establishing prejudice sufficient to excuse a procedural default). For the foregoing reasons, Claims 5 and 6 will be dismissed.

## VIII. CONCLUSION

As Mickens so vigorously contends, Saunders conducted himself unwisely, and in derogation of his ethical duties, in successively representing Hall and his murderer without ever bringing such representation to the attention of the court or Mickens. And, the Newport News JDR Court was on notice of sufficient facts about the relationship between Hall and Saunders that it should not have appointed Saunders to represent Mickens without a full inquiry and without apprising Mickens of the potential conflict. However, that representation did not violate Mickens' constitutional rights.

Claims 1, 2 and 4 are dismissed on the merits. Claims 3 and 5 through 12 are procedurally defaulted. Mickens has not attempted to excuse his default of Claim 3, accordingly that Claim is dismissed. With respect to Claims 5 and 6, Mickens has demonstrated cause, but not prejudice, thus, Claims 5 and 6 will be dismissed. Finally, Mickens has failed to show cause, or a fundamental miscarriage of justice to excuse his default of his remaining claims, thus Claims 7 through 12 are dismissed. The petition for a writ of habeas corpus is denied. The action is dismissed.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

### ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby ORDERED that:

1. Claims l, 2 and 4 are dismissed on the merits.
2. Claims 3 and 5 through 12 are procedurally defaulted and dismissed.
3. The petition for a writ of is denied.
4. The action is dismissed.



Mickens may appeal the decision of the Court. Should Mickens wish to do so, [F. Supp. 2d 616] written notice of appeal must be filed with the Clerk of the Court within thirty (30) days of the date of entry hereof. Failure to file a timely notice of appeal may result in the loss of the right to appeal.

It is so ORDERED.

[Filed Jan. 28, 2000]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA;
Richmond Division

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Civil Action No. 3:98cv102

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WALTER MICKENS, JR.,
*Petitioner*,

v.

FRED W. GREENE, WARDEN,
*Respondent*.

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## MEMORANDUM OPINION

Pursuant to 28 U.S.C. § 2254, Walter Mickens, a Virginia state prisoner who has been sentenced to death, filed a petition for a writ of habeas corpus challenging his conviction by the Circuit Court for the City of Newport News for capital murder. On January 13, 1999, an evidentiary hearing was held on Mickens' claims that his constitutional rights were violated because counsel labored under a conflict of interest. Briefing and argument followed and, by Memorandum Opinion issued on November 5, 1999, the petition was denied and the action was dismissed (hereinafter "November 5 Opinion"). Pursuant to Fed. R. Civ. P. 59 (e), Mickens has moved for an order altering or amending that judgment.

### I. STANDARD FOR ASSESSING A RULE 59(e) MOTION

The United States Court of Appeals for the Fourth Circuit has recognized three grounds for granting Rule 59(e) relief: "(l) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; (3) to correct a clear error of law or prevent manifest injustice." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993).



"The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Pacific Insurance Co. v. American Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (quoting 11 Wright et al., Federal Practice and Procedure § 2810.1, at 127-28 (2d ed. 1995)).

### II. THE GROUNDS ASSERTED BY MICKENS' FOR RULE 59(e) RELIEF

Mickens presents five basic arguments for relief under Rule 59(e).

First, he contends that the Court should reconsider that aspect of the decision which applies the preponderance of the evidence standard for adverse effect set forth by the Eleventh Circuit in *Freund v. Butterworth*, 165 F. 3d 839 (11th Cir.) (en banc), *cert. denied*, 120 S. Ct. 27 (1999).

Second, Mickens argues that there should be a revisitation of the conclusion that he failed to prove a "link" between the conflict of interest of his trial counsel ("Saunders") and his trial conduct. Part of the "link," according to Mickens, was Saunders' fear that he would be subjected to removal from the case, professional humiliation, disciplinary action, and possible suspension, if he revealed the successive representation during the course of his representation of Mickens.

Third, Mickens asserts that the judgment should be altered because of trial counsel's conflicting testimony at the evidentiary hearing that he did not perceive a conflict and that his representation of Mickens was not affected by his prior representation of Mr. Hall.

Fourth, Mickens argues that the Court did not adequately address, or incorporate into its decision, the unique circumstances of this case, in which, as a result of the protections of client confidences, Mickens and the Court are precluded from inquiry into the substance of the privileged relationship which Mickens maintains created the conflict.

Finally, Mickens argued that the Court erred in failing to apply the automatic reversal rule of *Ciak v. United States*, 59 F.3d 296 (2d Cir. 1995).

## III. DISCUSSION

It is unclear which aspect of Rule 59(e) is the basis for Mickens' request for alteration of the judgment. Considered as a whole, his motion seems to be based on the third ground for relief under Rule 59(e): "to correct a clear error of law, or to prevent manifest injustice." *Hutchinson*, 994 F.2d at 1081. To that end, Mickens contends that the November 5 Opinion neglected critical factual or legal issues. However, in pressing those arguments, Mickens disregards those portions of the opinion which actually addressed the theories now asserted as grounds for relief under Rule 59(e).

To begin, the November 5 Opinion considered, at some length, after having called for supplemental briefs on the issue, whether, to what extent and how to apply the standard set by *Freund*. (November 5 Opinion, pp. 30-57.) And, the November 5 Opinion assessed the propriety of applying *Ciak's* automatic reversal rule. (November 5 Opinion, pp. 62-63.) Mickens' motion reargues points presented and rejected previously. Hence, neither the first nor fifth of Mickens' arguments for Rule 59(e) relief warrants further consideration.

The second aspect of Mickens' motion is that the Court "failed to address" whether "Saunders' fear[ed] that he would be subjected to removal from the case, humiliation, and disciplinary action" if someone discovered his ethical breaches in representing Hall then Mickens. (Pet. 's Rule 59 (e) Motion at 1-2.) To the contrary, the November 5 Opinion squarely rejected that argument: 'Mickens contends his interests were further compromised by Saunders' attempts to conceal his ethical breaches. However, the evidence shows that Saunders never struggled with the ethical issues



envisioned by Mickens. (1/13/99 Hr. Tr. at 220, 228.)" (November 5 Opinion at 38; *see also, Id.* at 39-40, 56-57.)

The third facet of the motion is that, given the actual lapses and other questionable conduct which the Court found to have occurred (November 5 Opinion, pp. 38, 40, 52, 54, 57, 64), the Court erred in giving any credence to any of trial counsel's testimony. The November 5 Opinion fully assesses the testimony of counsel and nothing in the Rule 59(e) motion necessitates a revisitation of that discussion.

The fourth argument for relief is that "the Court did not adequately address and incorporate into its ruling the unique circumstances of this case, in which, as a result of the protections of [Hall's] confidences, the petitioner and the court, are precluded from inquiry into the substance of privileged relationship which petitioner maintains created the conflict." (Pet.'s Rule 59(e) motion at 2.) That contention likewise is not helpful to Mickens. As explained in the November 5 Opinion, the test set forth in *Freund*, recognizes that often "it is not practical or fair to require a subsequent client to prove what the former client disclosed to the lawyer during the prior representation." *Freund*, 165 F.3d at 859; (November 5 Opinion at 31.) Thus, once a petitioner "proves that subject matters of the present and prior representations are 'substantially related', the court will irrebutably presume that rei giant confidential information was disclosed during the former period of representation." *Id.* (quoting *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1028 (5th Cir. 1981)) .

The rather extended discussion of the modified application of the *Freund* test to this record is a thorough assessment of the unique circumstances created by the bar of privilege which protects against the disclosure of confidential communication from Hall to trial counsel. Thus, in reality, Mickens' Rule 59(e) motion is an improper attempt to reargue the issues decided in the November 5 Opinion and

will be denied. *See Delong v. Thompson*, 790 F. Supp. 594, 618 (E.D. Va. 1991) (quoting *Durkin v. Taylor*, 444 F. Supp. 879, 889 (E. D. Va. 1977)).

The Clerk is directed to send a copy of the Memorandum Opinion to counsel of record.

It is so Ordered.

/s/ Robert E. Payne
ROBERT E. PAYNE
United States District Judge

Richmond, Virginia
Date: January 28, 2000



[Filed Jan. 28, 2000]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

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Civil Action No. 3:98cv102

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WALTER MICKENS, JR.,
*Petitioner*,

v.

FRED W. GREENE, WARDEN,
*Respondent.*

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ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby ORDERED that Mickens' Rule 59(e) motion is denied.

The Clerk is directed to send a copy of this Order to all counsel of record.

It is so ORDERED.

/s/ Robert E. Payne
ROBERT E. PAYNE
United States District Judge

Richmond Virginia
Date:
January 28, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 00-4

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WALTER MICKENS, JR.,
*Petitioner-Appellant*,

v.

JOHN B. TAYLOR, WARDEN,
Sussex I State Prison,
*Respondent-Appellee*.

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Appeal from the United States District Court
for the Eastern District of Virginia,
at Richmond. Robert E. Payne, District Judge.
(CA-98-102-3)

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Argued: June 6, 2000
Decided: September 14, 2000

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Reported at 227 F.3d 203 (4th Cir. 2000)

Before WIDENER, MICHAEL, and MOTZ, *Circuit Judges*.

MICHAEL, *Circuit Judge*:

In 1993 a jury in Virginia state court convicted Walter Mickens of capital murder, and he was sentenced to death. Mickens' federal habeas counsel discovered something by chance that Mickens did not know: Mickens' lead counsel in his murder case was representing the murder victim on criminal charges at the time of the victim's death. The state judge who appointed counsel for Mickens knew or should have known that the back-to-back representation presented an apparent conflict, but the judge failed to inquire. This looks



bad, but there is more. Mickens' lead counsel had an actual conflict of interest as a result of his representation of the murder victim. These circumstances, taken [F.3d 206] together, require that Mickens be afforded a new trial under the authority of *Wood v. Georgia*, 450 U.S. 261 (1981). We therefore reverse the district court's judgment denying Mickens a writ of habeas corpus. The district court will award the writ on remand unless the Commonwealth of Virginia gives Mickens a new trial.

I.

We take the facts about the crime from the Supreme Court of Virginia, *Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678 (1994). *See* 28 U.S.C. § 2254(e)(1). On March 28, 1992, Timothy Hall, age seventeen, was living with his fourteen-year-old friend, Raheem Gordon, and Gordon's father in an apartment at 28th and Washington Streets in Newport News, Virginia. Between 7:00 and 8:00 p.m. that evening, Hall gave young Gordon a ride to the nearby Towers apartment building, where Gordon attended a party. Hall had intended to go to the same party later, but he never appeared. One item about Hall's dress that evening becomes important later: he was wearing a pair of Gordon's Nike brand "Cross Trainer" athletic shoes. At about 8:00 p.m. Vincent West and Bruce Mitchell, who were attending the Towers party, left and went to a nearby convenience store. After buying a few items and leaving the store, West and Mitchell went to a park next to the Towers building. While sitting in the park, West and Mitchell saw a man with a bicycle hiding in some bushes and looking at them. The man was later identified as the petitioner, Walter Mickens. Less than forty hours later, at about 12:30 p.m. on March 30, 1992, Chris Basford was walking along the James River in Newport News when he saw a body lying face down on a mattress beneath an abandoned construction company building. The body's legs were spread apart, and it was nude from the waist down,

except for socks. The body was identified as that of Timothy Hall. Pubic hairs were recovered from the buttocks of Hall's body. There were bloody "transfer" stains on the outsides of his thighs, and there was a white liquid substance close to his anus. The autopsy by the medical examiner revealed that Hall had been subjected to 143 separate "sharp force injuries." The examiner concluded that Hall had bled to death and that twenty-five of the wounds were fatal. The examiner opined that the fatal wounds may not have caused instant death and that Hall could have lived as long as thirty to forty minutes after infliction of the last wound.

On the evening of April 4, 1992 (five days after Hall's body was found), the Newport News police, Officer D.A. Seals and Detective Dallas Mitchell, responded to a complaint that an African-American male, who was riding a bicycle, had assaulted a juvenile. Seals and Mitchell soon found Mickens riding a bicycle in the parking area at the abandoned construction company building. When Seals displayed his badge and approached Mickens, Mickens fled on his bicycle. He did not get far. Seals and Mitchell tracked Mickens down as he was being detained by other officers. Mickens was arrested at 7:00 p.m. on the charges involving the juvenile. After Mickens was given his Miranda warnings, he agreed to talk. Without telling Mickens how Hall had been murdered, Detective Mitchell told Mickens that he knew Mickens had killed Hall. Mickens denied any involvement in Hall's murder, but said, "You didn't find any knife on me, did you?" The following morning, the police obtained warrants charging Mickens with the murder and attempted sodomy of Hall. When Detective Seals handed Mickens the warrants, Mickens said, "I accept the warrants, I accept the charges." Seals asked Mickens what he meant by that, and Mickens responded, "Mother f___r, if I told you I accept the warrants that means I'm guilty, don't it?"



On April 7, 1992, the police found Michael Jacobs wearing the Nike brand [F.3d 207] "Cross Trainer" shoes that Hall had been wearing when Raheem Gordon had last seen Hall alive. Jacobs testified that he had bought the shoes from Mickens for $5.00 the previous week (the week Hall's body was found).

The Commonwealth offered the following evidence through expert witnesses. The pubic hairs removed from Hall's buttocks were from an African-American and were alike in "all identifiable microscopic characteristics" to the pubic hair sample taken from Mickens, who is African-American. Tissue was attached at the roots of the hairs, indicating that the hairs had been forcibly removed, possibly by the rubbing of genitals against Hall's buttocks. The stain on the mattress cover was of human sperm. DNA analysis (RFLP type) revealed that Hall could not have produced the sperm. Mickens' DNA pattern matched the DNA pattern in the sperm, however. The approximate percentages of the population that could have deposited the sperm were one in 27,000 Caucasians, one in 6,000 African-Americans, and one in 2,000 Hispanics.

On March 26, 1993, about a year after Hall's murder, Mickens was in a holding cell at the courthouse with a man named Tyrone Brister. Brister testified about his encounter with Mickens. Brister asked Mickens why he was there, and Mickens answered, "They said I stabbed somebody 140 something times in the head." Mickens then lowered his voice and said, "w..ch I did." Mickens also told Brister that "they" said he also sodomized the victim and stole his sneakers. Again, Mickens lowered his voice and said, "which I did."

The jury found Mickens guilty of the capital murder of Hall, specifically, murder during the commission of, or following, an attempted forcible sodomy. Mickens was sentenced to death, and the Supreme Court of Virginia affirmed. *See Mickens v. Commonwealth*, 247 Va. 395, 442

S.E.2d 678 (1994). The United States Supreme Court granted his first petition for certiorari and remanded the case "for further consideration in light of *Simmons v. South Carolina*, 512 U.S. 154 (1994)." *Mickens v. Virginia*, 513 U.S. 922 (1994). On remand the Supreme Court of Virginia concluded that *Simmons* mandated a resentencing because "the jury was entitled to be informed of Mickens' parole ineligibility." *Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9, 10 (1995). On February 5-8, 1996, the trial court held a new sentencing hearing. The jury again fixed Mickens' sentence at death. Mickens appealed, the Supreme Court of Virginia affirmed the sentence, *see Mickens v. Commonwealth*, 252 Va. 315, 478 S.E.2d 302, 307 (1996), and the Supreme Court denied certiorari, *see Mickens v. Virginia*, 520 U.S. 1269 (1997). Mickens then pursued state post-conviction relief. The Supreme Court of Virginia summarily denied his petition for a writ of habeas corpus on December 15, 1997. Mickens then sought federal habeas corpus relief with the assistance of counsel appointed by the district court.

It was Mickens' federal habeas counsel who first discovered that Mickens' lead trial counsel, Bryan Saunders, labored under a conflict of interest. (The facts about the conflict issue are taken from the findings of the district court in Mickens' federal habeas proceeding.) While investigating Mickens' case, federal habeas counsel went to the Newport News Juvenile and Domestic Relations Court (JDR Court) to review Mickens' JDR file. While there, counsel also asked the clerk on duty for any files involving Timothy Hall. Although juvenile case files are confidential and are not to be disclosed publicly without a court order, *see* Va. Code Ann. § 16.1-305, the clerk slipped up and produced Hall's file. This file revealed that at the time of Hall's death, Saunders was representing him on assault and concealed weapon charges. The first of these charges originated on February 21, 1992, when Hall's mother swore out a warrant [F.3d 208] for assault and battery against him. She said that her son had



grabbed her by the arms and shoved her to the ground. Hall was booked again around March 13, 1992, when the Newport News police charged him with possession of a concealed weapon (a serrated bread knife wrapped in paper). Hall appeared before the JDR Court on March 20, 1992, when Judge Paul Criver, Jr. appointed Saunders to represent Hall on the two charges. A hearing in the matter was continued to April 3, 1992. Sometime between March 20 and March 28, 1992 (the day Hall was last seen alive), Hall came to Saunders' office for an interview that lasted between fifteen and thirty minutes. They discussed the circumstances surrounding each of the charged crimes.

On Friday, April 3, 1992, four days after Hall's body was discovered, Judge Aundria Foster of the JDR Court dismissed the assault and concealed weapon charges against Hall, noting that he was deceased. Judge Foster's handwritten order was entered on the individual docket sheet for Hall's case. The docket sheet was a single page that included Hall's full name, his date of birth, the charges, an abbreviated history of the proceedings, and the identity of his appointed lawyer, Saunders. That same day Saunders went to the courthouse for the scheduled hearing in Hall's case, and someone (Saunders does not recall whom) told him that Hall was dead and that the case had been dismissed. Mickens was arrested the next day, Saturday, April 4, 1992. On the following Monday, April 6, 1992, Judge Foster—the same judge who handled the dismissal of Hall's case—appointed Saunders to represent Mickens in his trial for the capital murder of Hall. Mickens' arrest warrants, which appear to have been before Judge Foster when she appointed Saunders, charged that "on or about March 30, 1992" Mickens murdered "Timothy Jason Hall, white male, age 17, by stabbing, and during the commission of an abduction, and sodomy as well as robbery." *Mickens v. Greene*, 74 F. Supp. 2d 586, 614 (E.D. Va. 1999). Judge Foster did not make any inquiry into whether Saunders would have a conflict in representing Mickens.

Following his appointment, Saunders represented Mickens at the guilt phase of his murder trial and at both of his sentencings. Saunders worked with court-appointed co-counsel, Warren Keeling, but Saunders was responsible for about ninety percent of the workload. Keeling did take the lead at the sentencings. Neither Saunders nor Keeling represented Mickens on his state habeas petition. Saunders never told Mickens (or Keeling) that he had represented Hall, and Mickens did not learn about it until federal habeas counsel saw Hall's JDR file.

On June 25, 1998, Mickens filed a petition in federal court for a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied the petition. That court rejected the conflict of interest claim after concluding that "the possible conflict of interest presented by Saunders' successive representation of Hall and Mickens never ripened into an actual conflict nor was Saunders' advocacy impaired thereby." *Mickens*, 74 F. Supp. 2d at 615. The district court also rejected Mickens' other claims, including those for ineffective assistance of counsel and insufficiency of evidence. Mickens raises several issues on appeal, but he devotes most of his attention to the question of Saunders' conflict of interest. Because Mickens filed his federal habeas petition after the April 24, 1996, enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, we apply 28 U.S.C. § 2254 as amended by AEDPA. *See Mueller v. Angelone*, 181 F.3d 557, 565-72 (4th Cir.), *cert. denied*, 120 S. Ct. 37 (1999). We now turn to the issues.

## II.

The Sixth Amendment guarantees a defendant in a criminal case the [F.3d 209] right to effective assistance of counsel, which includes the right to representation that is free of conflicts of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980). Mickens argues that either of the following



two circumstances mandates an award of the writ on conflict grounds: (1) the state court failed to inquire into Saunders' conflict of interest when it knew or should have known that a conflict existed, and (2) Saunders labored under an actual conflict of interest that adversely affected his representation. Conflicts claims present "mixed questions of law and fact that we review de novo." *See Williams v. French*, 146 F.3d 203, 212 (4th Cir. 1998) (citing *Sullivan*, 446 U.S. at 342), *cert. denied*, 525 U.S. 1155 (1999). Of course, the district court's underlying factual findings "are subject to the clearly erroneous standard set forth in Rule 52(a), Fed. R. Civ. P." *Fields v. Attorney General*, 956 F.2d 1290, 1297 n.18 (4th Cir. 1992).

### A.

Before we examine the merits of Mickens' conflicts claim, we address the Commonwealth's argument that this claim is barred under the requirement for exhaustion and the doctrine of procedural default. The exhaustion doctrine bars a claim if it is raised for the first time in a federal habeas petition. *See Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir.) (citing *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997)), *cert. denied*, 523 U.S. 371 (1998). The procedural default doctrine bars a claim when the habeas petitioner "fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.'" *Id.* (quoting *Coleman v. Thompson*, 501 U. S. 722, 735 n. 1 (1991)).

A petitioner may overcome both the exhaustion and procedural default bars by showing cause and actual prejudice. *See Breard*, 134 F.3d at 620. A petitioner can establish cause by showing "that the factual basis for [the] claim was unavailable to him at the time he filed his state habeas petition." *Id. See also McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991); *Williams*, 146 F.3d at 209. The district

court concluded that Mickens established cause: "Here, Saunders' silence and state law requirements for secrecy of juvenile court records operated together to preclude Mickens from raising the conflict of interest claims in his state habeas petition." *Mickens*, 74 F. Supp. 2d at 600. Juvenile files are confidential and may not be produced without court order. *See* Va. Code Ann. § 16.1-305. The Commonwealth nevertheless argues that if federal habeas counsel was able to discover the facts behind the conflicts claim, then Mickens could have done the same thing when he was developing his claims on state habeas. We disagree. As the district court found, "the fortuitous circumstances by which federal habeas counsel discovered the truth about Saunders' conflict prove beyond question that Mickens did not fail in his duty to inquire in the state court proceedings." *Mickens*, 74 F. Supp. 2d at 601 (citing *Amadeo v. Zant*, 486 U.S. 214, 224 (1988)). It was only through a clerk's mistake that federal habeas counsel saw Hall's JDR file, and as soon as a supervisor discovered the error, the file was taken from federal habeas counsel. Under these circumstances, we agree with the district court that "the factual predicate for [the conflicts claim] was not available to Mickens in state court nor was it discoverable through the exercise of diligent investigation." *Mickens*, 74 F. Supp. 2d at 602. Mickens has established cause.

To establish prejudice to excuse his default, a petitioner must show that his counsel's error "worked to his actual and [F.3d 210] substantial disadvantage," not merely that the error "created a possibility of prejudice." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis omitted). In conflict of interest cases prejudice is presumed once a petitioner establishes the merits of the underlying claim. *See Sullivan*, 446 U.S. at 349-50; *Wood v. Georgia*, 450 U.S. 261, 273-74 (1981). Our prejudice inquiry in this case thus incorporates the test for establishing the underlying conflict of interest claim. *See Williams*, 146 F.3d at 212-13 (analyzing actual



prejudice by examining the merits of petitioner's conflict of interest claim); *Rosenwald v. United States*, 898 F.2d 585, 587 (7th Cir. 1990) (concluding that to show actual prejudice the petitioner must establish the merits of his *Sullivan* claim). This means that we proceed directly to the merits of Mickens' conflict of interest claim.

B.

Mickens' first conflict argument is that he must be retried for the following reason: the state judge who appointed Saunders to represent him on the capital murder charge conducted no inquiry even though the judge knew or should have known that Saunders' back-to-back representation of the murder victim and the accused would present a conflict. As a general rule, to establish ineffective assistance of counsel, a petitioner must show (1) objectively unreasonable performance and (2) prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A different test applies when there is a conflict of interest claim: "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348. As we have said, "[w]hen counsel for a defendant in a criminal case has an actual conflict of interest . . . and the conflict adversely affects counsel's performance in the defense of the defendant, prejudice to the defense is presumed and a new trial must be ordered." *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir.1991) (citing *Sullivan*, 446 U.S. at 348-50).

There is a circumstance where a showing of adverse effect is not required, according to *Wood v. Georgia*, 450 U.S. 261 (1981). We have described that circumstance as follows: "In *Wood v. Georgia*, the Court flatly stated that a *conflict situation* which is not addressed by the trial court requires reversal . . . 'when the trial court has failed to make an inquiry even though it knows or reasonably should know that a particular conflict exists.'" *Tatum*, 943 F.2d at 379

(emphasis added, internal citation omitted) (quoting *Wood*, 450 U.S. at 272 n.18 (internal quotation marks omitted)). The Supreme Court decided *Wood* on conflict of interest grounds even though neither party had raised the conflict issue. *See Wood*, 450 U.S. at 265 n.4. The Court concluded that "the record . . . demonstrate[d] that the *possibility* of a conflict of interest was sufficiently apparent at the time of the [probation] revocation hearing to impose upon the [state] court a duty to inquire further." *Id.* at 272. However, the Supreme Court could not "determine whether an actual conflict of interest was present, especially without the benefit of briefing and argument." *Id.* Accordingly, the Court ordered that the case be returned to the state trial court for "a hearing to determine whether the conflict of interest that th[e] record strongly suggest[ed] actually existed at the time of the probation revocation or earlier." *Id.* at 273. Significantly, the *Wood* Court only asked the state court to determine whether there was an actual conflict; it did not require an additional finding of adverse effect. The Supreme Court specifically instructed the state court that if it found "an actual conflict of [F.3d 211] interest" and "no valid waiver of the right to independent counsel," "it must hold a new . . . hearing that is untainted by a legal representative serving conflicting interests." *Id.* at 273-74. Accordingly, to prevail under *Wood* a petitioner must establish that (1) the trial court failed to inquire even though it knew or reasonably should have known about an apparent conflict, *see id.* at 272; *Tatum*, 943 F.2d at 379, (2) there "was no valid waiver of the right to independent counsel," *Wood*, 450 U.S. at 274, and (3) counsel had "an actual conflict of interest," *id.* at 273. Under *Wood* once a petitioner makes this showing, prejudice is presumed, and the petitioner is entitled to a new trial with conflict-free counsel. *See id.* at 273-74.

*Wood* places a special responsibility on trial courts to police situations that present apparent conflicts. As we have said, "[w]hen the risk of a conflict of interest is brought to the



attention of the trial court . . . the court has the responsibility to investigate further, to advise the defendant personally, and to receive a knowing waiver if that is the expressed wish of the defendant." *Tatum*, 942 F.3d at 379. If a court fails to initiate an inquiry when it knew or reasonably should have known of an apparent conflict, it has not carried out its responsibility. Careful attention to conflicts is essential to protecting a defendant's Sixth Amendment right to counsel: "'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel.'" *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978) (quoting *Glasser v. United States*, 315 U.S. 60, 71 (1942)), *quoted in Tatum*, 942 F.3d at 379. This includes protecting the defendant's right to a lawyer who is free of conflicts. A trial judge's immediate attention to obvious conflicts is also important to maintain the integrity of, and public respect for, the justice system. *See Wheat v. United States*, 486 U.S. 153, 160 (1988) (noting that "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them"). *Wood* supports these principles by encouraging (in a practical way) trial judges to deal promptly with apparent conflicts: the case dispenses with the requirement to show adverse effect when a judge should have inquired, yet failed to do so, thus making it somewhat easier to obtain a new trial.[1] [F.3d 212]

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[1] Despite the dissent's suggestion, *see post* at 24, we do not read *Wood* as overruling *Sullivan* by implication when we point out that *Wood* does not require a defendant to show adverse effect if the trial judge has failed to inquire into an apparent conflict. Because *Sullivan* and *Wood* addressed circumstances that are quite different, the two cases are easily harmonized. In *Sullivan* the trial judge had no duty to inquire because the defendant did not object to multiple representation and there was simply "the mere possibility of a conflict." *Sullivan*, 446 U.S. at 345, 347. In this context,

Mickens meets the *Wood* test. First, the district court concluded that Judge Foster "knew, or should have know[n]" of the "apparent possible conflict." *Mickens*, 74 F. Supp. 2d at 613-15. On April 3, 1992, Judge Foster dismissed the charges against Timothy Hall due to his death by making a handwritten order on his individual docket sheet. That single-paged docket sheet identified Saunders as Hall's lawyer. "[T]he next business day, Judge Foster appointed Saunders to represent Mickens in the capital murder of Hall." *Id.* at 614. In addition to these circumstances, "[t]he heinous nature of

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when the trial court has no duty of inquiry, the Supreme Court requires a defendant to "demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348. *Sullivan*, however, was careful to point out that a trial court must "initiate an inquiry" when it "knows or reasonably should know that a particular conflict exists." *Id.* at 347. But *Sullivan* did not articulate the defendant's burden when the trial court fails to fulfill a clear duty to inquire. That was left open for *Wood*. In *Wood* the record reflected much more than the "mere possibility" of a conflict. Rather, the state trial judge was faced with an apparent conflict—one that was clearly suggested by the circumstances. Because there was an apparent conflict, *Wood* held that the trial judge had a constitutional duty to inquire. *See Wood*, 450 U.S. at 272. The failure to fulfill this duty carries a definite consequence, as the Court's remand order establishes:

> [The state] court should hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier. If the court finds that an actual conflict of interest existed at that time, and that there was no valid waiver of the right to independent counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests.

*Id.* at 273-74. This is not "shorthand for[*Sullivan*'s] two-part test," *see post* at 25; rather, the requirement for showing adverse effect is clearly omitted.

Our circuit opinions do not prevent us from applying *Wood* in Mickens' case, where the state judge was confronted with an apparent conflict. In the Fourth Circuit cases mentioned by the dissent (*Gilliam*, *Beaver*, and *Tatum*), *see post* at 220-22, we did not conclude that the trial judge had a constitutional duty to inquire. As a result, it was proper to apply *Sullivan* and not *Wood*.



the crime and the publicity it received make it difficult to accept that the connection would have escaped Judge Foster's notice." *Id.* And, "the judge was no doubt aware that Mickens faced charges as to which it might be necessary to counter 'evidence about the victim and about the impact of the murder on the victim's family,' at least at the penalty phase of the case." *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). These facts and circumstances are sufficient to show that Judge Foster knew or should have known of the apparent conflict.[2] Mickens also did not waive his right to conflict-free counsel. Since he was never informed of the conflict of interest, he had no opportunity to either consider the conflict or to knowingly and intelligently waive his rights. As we discuss next, Mickens establishes an actual conflict of interest.[3] [F.3d 213]

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[2] The district court concluded that JDR Judge Foster, who handled Mickens' preliminary hearing, "was not relieved of her duty to inquire" into the conflict situation simply because "the trial was to be conducted in another court." *Mickens*, 74 F. Supp. 2d at 615. The district court was correct. The right to conflict-free counsel arises at the beginning of a case. *See Holloway*, 435 U.S. at 489-90 (discussing the importance of conflict-free counsel at the pretrial stage).

[3] Mickens also argues that he is entitled to a new trial even without showing an actual conflict. Relief is required, he says, simply because the state judge neglected her duty to inquire into a potential conflict of interest. He thus seeks relief under what is sometimes called the "automatic reversal rule," which is based on a sentence from *Wood*: "*Sullivan* mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" *Wood*, 450 U.S. at 272 n.18 (quoting *Sullivan*, 446 U.S. at 347). At least one circuit (the Second) applies the automatic reversal rule when a judge who knew or should have known of a possible conflict failed to make an inquiry. *See Ciak v. United States*, 59 F.3d 296, 298, 307 (2d Cir. 1995) (holding that automatic reversal rule applies to federal habeas cases); *United States v. Levy*, 25 F.3d 146, 153 (2d Cir. 1994) (stating automatic reversal rule as follows: "When a possible conflict has been entirely ignored, reversal is automatic."). Because, as we will explain, Mickens has shown an

We begin our analysis of the actual conflict issue by considering Mickens' challenge to the test used by the district court. The district court used a modified version of a test for actual conflict developed by the Eleventh Circuit in *Freund v. Butterworth*, 165 F.3d 839 (11th Cir.) (en banc), *cert. denied*, __U.S.__, 120 S. Ct. 57 (1999). *Freund* distinguishes between cases of successive representation (such as Mickens') and cases of simultaneous or multiple representation. The *Freund* decision requires the petitioner to satisfy a tougher test in a successive representation case: such a petitioner "must show that either (1) counsel's earlier representation . . . was substantially and particularly related to counsel's later representation of petitioner, or (2) counsel actually learned particular confidential information during the prior representation . . . that was relevant to petitioner's later case." *Freund*, 165 F.3d at 859 (internal quotation marks, emphasis, and alterations omitted). Moreover, proof of either of these elements may not be enough, and the petitioner may be called upon to introduce "other proof of inconsistent interests." *Id.* (internal quotation marks omitted). Recognizing that neither the Supreme Court nor we have ever restricted proof of a conflict to the "two [*Freund*] scenarios," the district court did modify the test to allow Mickens to meet

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actual conflict, we do not decide whether the "automatic reversal rule" should be adopted in this circuit.

The dissent suggests that our application of *Wood* "is functionally equivalent to the automatic reversal rule." *Post* at 222. It is not. We are applying *Wood* in a straightforward way: when the trial court fails to carry out its constitutional duty to inquire into an apparent conflict, the defendant is entitled to a new trial if his counsel labored under an actual conflict. On the other hand, under the automatic reversal rule the defendant gets a new trial when the trial court fails to inquire into "even the possibility" of a conflict. *Levy*, 25 F.3d at 153. In practice, possible conflicts do not always turn out to be actual conflicts. There is a real difference between the automatic reversal rule and our straight application of *Wood*.



his burden "through other proof of inconsistent interests . . . if the interests actually diverged." *Mickens*, 74 F. Supp. 2d at 603 (internal quotation marks omitted).

Even though the district court's modification arguably broadens the *Freund* test, we decline to adopt that test, even as modified. Neither the Supreme Court nor this court has ever held that a stricter test should apply to a case of successive representation. In our most recent opinion involving successive representation, *Burket v. Angelone*, 208 F.3d 172 (4th Cir.), *cert. denied*, __U.S.__, 120 S. Ct. 2761 (2000), we neither mentioned *Freund* nor indicated that successive representation cases should be treated any differently than cases of multiple representation. Instead, *Burket* reaffirmed that a variety of conflicting interests may infect a lawyer's representation:

> Counsel's "representation of conflicting interests, however, is not always as apparent as when he formally represents two parties who have hostile interests. He may harbor substantial personal interests which conflict with the clear objective of his representation of the client, or his continuing duty to former clients may interfere with his consideration of all facts and options for his current client."

*Burket*, 208 F.3d at 185 (quoting *Tatum*, 943 F.2d at 376). To determine whether *Sullivan*'s "actual conflict" requirement is met, we have formulated the following test: "To establish an actual conflict of interest, the petitioner must show that his interests 'diverge[d] with respect to a material factual or legal issue or to a course of action.'" *Williams*, 146 F.3d at 212 (quoting *Sullivan*, 446 U.S. at 356 n.3 (Marshall, J., concurring in part and dissenting in part)). *See also Gilbert v. Moore*, 134 F.3d 642, 652 (4th Cir.) (stating same test), *cert. denied*, 525 U.S. 840 (1998). We adhere to our existing test.

Mickens contends that Saunders labored under one or more actual conflicts of interest. Mickens begins by arguing that his interests diverged from Saunders' because Saunders had a significant personal stake in not revealing his prior representation of Hall. The district court rejected this claim on the basis of Saunders' statements that he saw no conflict of interest and that as far as he was concerned his representation of Hall "[e]nded when I walked into the courtroom and they told me he was dead and the case was gone." We conclude that the district court erred. To begin with, the district court decided to put great weight on Saunders' [F.3 d 214] testimony based on our observation in *United States v. Young*, 644 F.2d 1008 (4th Cir. 1981), that a court "accords great weight to a lawyer's perception of a conflict" when evaluating a conflicts claim. 644 F.2d at 1014. However, the district court did not consider our next crucial statement that "courts necessarily rely in large measure upon the good faith and good judgment of defense counsel in determining whether an actual conflict of interest exists." *Id.* (internal quotation marks omitted). The difficulty with placing "great weight" on Saunders' testimony that he did not see a conflict is that the district court repeatedly found that Saunders did not exercise good judgment. *See, e.g., Mickens*, 74 F. Supp. 2d at 605 (noting that Saunders' view that he had no continuing allegiance to Hall was "remarkably wrong"); *id.* at 606 (noting that Saunders' failure to disclose his prior representation of Hall was "inexcusable"); *id.* at 612 n.20 (finding that Saunders' testimony that "he assumed that [his co-counsel] (and everyone else) knew that he had represented Hall . . . lacks evidentiary support and . . . borders on the absurd"); *id.* at 612 (finding that Saunders had a "myopic view of the potential conflicts and [an] utter insensitivity to the ethical issues raised by the facts"); *id.* at 605 (stating that "the evidence shows that, regrettably, Saunders never struggled with the ethical issues"); *id.* at 611 (concluding that Saunders' reasons for failing to pursue investigative leads



"are not defensible"). In situations such as this where a lawyer fails to exercise good judgment, courts do not hesitate to disregard a lawyer's testimony that he did not perceive a conflict of interest. *See United States v. Swartz*, 975 F.2d 1042, 1046-48 (4th Cir.1992) (rejecting lawyer's statement that he had "[n]o conflict whatsoever" in representing two defendants in same case); *Hoffman v. Leeke*, 903 F.2d 280, 286 (4th Cir. 1990) (rejecting lawyer's testimony that "he saw no conflict of interest because he thought [his two clients in the same criminal case] would testify to substantially the same facts"); *cf. Wheat*, 486 U.S. at 163 (holding that a court may disqualify a lawyer who is willing to accept a client's waiver of a conflict of interest and observing "that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information [about potential problems] to them"). Thus, *Young* does not establish a rule that courts must always accord great weight to a lawyer's perception about whether an actual conflict exists. Rather, when it is clear that the lawyer lacks good faith or good judgment, his testimony may be disregarded, or at least not be given "great weight." Here, we are not suggesting that Saunders' testimony should have been rejected, but it was certainly not entitled to great weight in light of the district court's several findings that confirmed Saunders' poor judgment.

In any event, because the district court took Saunders' testimony as truthful, so do we. Still, his testimony—taken at whatever weight—does not undermine Mickens' argument that there was an actual conflict. As we have repeatedly recognized, a lawyer's personal interests may "conflict with the clear objective of his representation of the client." *Burket*, 208 F.3d at 185 (quoting *Tatum*, 943 F.2d at 376). *See also Fields*, 956 F.2d at 1298-99 (noting that petitioner arguably demonstrated a conflict when his interests diverged from his lawyer's "interest in protecting his own professional

reputation and good-standing"); *United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992). When Saunders undertook the representation of Mickens, it was clearly established that "[d]efense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises." *Sullivan*, 446 U.S. at 346. *See also* Va. Code Prof'l Responsibility DR:5-105(A) (Michie 1992). And, the Virginia Code of Professional Responsibility (as it was called at the time of Mickens' trial) provided that a lawyer had [F.3d 215] the duty to "explain any circumstances that might cause a client to question his undivided loyalty." Va. Code Prof'l Responsibility EC:5-19 (Michie 1992). As the district court found, "Saunders' representation of the murder victim, at the time of the murder, is undoubtedly a circumstance 'that might cause a client to question his undivided loyalty.'" *Mickens*, F. Supp. 2d at 601. Regardless of whether Saunders believed he could ethically represent Mickens, he was also required to "defer to a client who [held] the contrary belief [by] withdraw[ing] from representation of that client." Va. Code Prof'l Responsibility EC:5-19 (Michie 1992). Saunders thus had the duty to inform both Mickens and the court of the prior representation of Hall. If Mickens had objected, Saunders had a related duty to withdraw.

Once Saunders proceeded with the representation of Mickens in these circumstances, he was potentially subject to disciplinary proceedings, which gave rise to an interest in protecting his professional reputation. In other words, Saunders had an interest in preventing his representation of Hall from coming to light. This interest diverged from Mickens' interest in learning about the earlier representation and in making sure he (Mickens) received conflict-free representation. Saunders was thus caught in an actual conflict. *See Fields*, 956 F.2d at 1298-99 (recognizing potential conflict when client's interest required lawyer "to confess his own negligence or incompetence," but ultimately rejecting



claim because once lawyer "frankly admitted [his errors] in open court," "any conflict that might have stemmed from [the lawyer's] interest in protecting his professional standing evaporated"); *cf. United States v. Iorizzo*, 786 F.2d 52, 58 (2d Cir. 1986) (holding that defendant established conflict of interest claim when lawyer, "solely to protect" his own interest in his professional reputation, decided to forego cross-examination of witness that lawyer had previously represented); *Government of the Virgin Islands v. Zepp*, 748 F.2d 125, 136 (3d Cir. 1984) (holding that an actual conflict existed when defendant's interests diverged from trial counsel's personal interest in avoiding potential criminal and disciplinary charges for destroying evidence in defendant's case). Saunders' testimony that he did not perceive a conflict may speak to whether the conflict caused an adverse effect, but it does not negate the reality of an actual conflict.

Mickens next contends that an actual conflict existed because Saunders could not investigate Hall, using the confidential information he learned from the young man, without violating the ethical duties that he (Saunders) owed to Hall, his former client. Saunders had a duty to preserve Hall's secrets and confidences even though his employment as Hall's lawyer had ended. *See* Va. Code Prof'l Responsibility DR:4-101, EC:4-6 (Michie 1992). The Supreme Court has recently reaffirmed the common law rule that a lawyer's duty to protect his client's confidences continues after the client's death. *See Swidler & Berlin v. United States*, 524 U.S. 399, 410-11(1998). Saunders also had a duty to zealously represent Mickens. *See* Va. Code Prof'l Responsibility DR: 7-101 (Michie 1992). In representing Mickens, Saunders could not pull his punches in order to protect what he knew about Hall.

The district court applied the *Freund* test to reject Mickens' conflicts claim on the ground that "Saunders did not learn any confidential information from Hall that was

relevant to Mickens' defense either on the merits or at sentencing." *Mickens*, 74 F. Supp. 2d at 606 (emphasis omitted). The district court erred as a matter of law because it focused too narrowly in describing the circumstance (defense on the merits or at sentencing) where confidential information might be relevant or useful. We have held that an actual conflict can also arise at the investigation and plea negotiation stages of a representation. *See Burket*, 208 F.3d at [F.3d 216] 185 ("'[A] failure to act on behalf of a client before trial has representational significance.'" (quoting *Tatum*, 943 F.2d at 376)); *Magini*, 973 F.2d at 263 ("A conflict which causes counsel to fail to explore possible plea negotiations may implicate the Sixth Amendment right to counsel."). The proper inquiry, therefore, is whether Saunders' interest (or duty) in maintaining Hall's secrets and confidences diverged from Mickens' interest in pursuing a course of action, specifically, a reasonable pretrial investigation. *See Williams*, 146 F.3d at 212. Here, the divergence of interests was sufficient to create a second actual conflict.

The district court found that Saunders learned the following information through his representation of Hall: "(a) Hall had been charged with carrying a concealed weapon at the intersection of 27th Street and Marshall in Newport News; (b) Hall's mother had pressed charges against him for assault . . . ; and (c) Hall was not living with his mother at the time of his death." *Mickens*, 74 F. Supp. 2d at 606. The district court also found that Saunders met with Hall for fifteen to thirty minutes and that they discussed "the circumstances surrounding each of the charged crimes." *Id.* at 599. Finally, the district court acknowledged that Saunders obtained confidential information from Hall. *Id.* at 606. Saunders thus learned "confidences" and "secrets" in his representation of Hall that he (Saunders) was bound not to reveal. *See* Va. Code Prof'l Responsibility DR:4-101 (Michie 1992); *Commonwealth v. Edwards*, 235 Va. 499, 370 S.E.2d



296, 301 (1988). Moreover, under Virginia law even the charges against Hall were confidential because they were in Hall's juvenile court records which cannot be opened to those outside the juvenile court system without a court order. *See* Va. Stat. Ann. § 16.1-305.

Juxtaposed to Saunders' duty to remain loyal to Hall by maintaining his confidences and secrets was a duty he owed to his new client, Mickens. As illustrated by the American Bar Association's standards, Saunders had the duty to conduct a thorough pretrial investigation for Mickens: "Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *ABA Standards for Criminal Justice* Standard 4-4.1(a) (3d ed. 1993). The Supreme Court and our circuit have recognized the ABA standards as "guides to determining what is reasonable." *Strickland*, 466 U.S. at 688, *quoted in Jones v. Murray*, 947 F.2d 1106, 1110 (4th Cir. 1991). Saunders did not investigate (or attempt to develop) any negative information about Hall, the victim of the crime Mickens allegedly committed. Yet the circumstances of this crime (murder and sodomy) suggested that some consideration had to be given to investigating the character and background of the victim. There were no witnesses to Hall's murder, which occurred in a secluded area that was a "known gathering place for homosexuals," *Mickens*, 74 F. Supp. 2d at 607. Saunders knew from his representation of Hall that Hall had some tendency to violence or aggressiveness and that for some reason he was no longer living at home, despite his young age. This information, together with the notable location of Hall's murder, at least suggested an investigation into whether consent to the sodomy and self-defense to the murder might be defenses or statutory mitigators. In other words, the negative information Saunders had about Hall had the potential to lead to information about the circumstances of the crime. Indeed, the

district court recognized that "a reasonable investigation would have included an examination of Hall's past." *Id.* at 610. Nevertheless, the district court did not see a problem. The court concluded that the confidential information Saunders had about Hall did not create an actual conflict because it "was irrelevant to Mickens' defense" since he denied committing the crime. *Id.* at 606. This analysis misses [F.3d 217] the mark because a lawyer has an initial duty to investigate and to make his own, independent appraisal of the case. *See ABA Standards for Criminal Justice* Standard 4-4.1(a). Of course, obvious avenues of investigation do not always lead to relevant evidence or viable defenses. The point is that reasonable areas of investigation must be considered and pursued. Because of Saunders' duty to protect Hall's secrets and confidences, he could not even *consider* an investigation that was suggested by the circumstances. *See Tatum*, 943 F.2d at 376 (noting that actual conflict exists when lawyer's "continuing duty to former client[ ] . . . interfere[s] with his *consideration* of all facts and options for his current client") (emphasis added). We recognize that in its adverse effect inquiry the district court "credit[ed] Saunders' testimony that he did not refrain from taking any actions for Mickens because of his earlier representation of Hall." *Mickens*, 74 F. Supp. 2d at 612. But that begs the question whether Saunders had an actual conflict in the first place. Saunders' testimony that there was no adverse effect does not address whether Mickens' interests diverged from Saunders' interests in protecting Hall's confidences. Saunders had an actual conflict because he could not even consider an investigation into Hall's character or background, using as a starting point the information he had about the circumstances of the crimes charged against Hall.

Saunders' duty to conduct a reasonable investigation created still another conflicting interest. Because this was a capital case, there was a good chance that someone from the victim's family (perhaps Hall's mother) would testify during



the penalty phase. *See* Va. Stat. Ann. § 19.2-264.4 (Michie 1992); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Mickens*, 74 F. Supp. 2d at 614. Again, there is a duty to "explore all avenues leading to facts relevant to . . . the penalty." *ABA Standards for Criminal Justice* Standard 4-4.1(a). Surely this would require defense counsel to consider investigating the victim's relationship with key family members, especially (in this case) the victim's mother since the victim was a juvenile. Here, Saunders, while he represented Hall, learned something about his relationship with his mother and about the fact that he no longer lived at home. In particular, Saunders learned about the circumstances leading to the charge that Hall had "grabbed [his mother] by the arms and shoved her to the ground" shortly before his death. *Mickens*, 74 F. Supp. 2d at 599. This confidential or secret information that Saunders had about some aspects of Hall's relationship with his mother also created a conflict: Saunders' interest in preserving Hall's confidences diverged from Mickens' interest in having Saunders consider an investigation into Hall's relationship with his mother.

In sum, Mickens must be afforded a new trial because of the conflict of interest problem. He has shown that (1) the state judge failed to inquire into an apparent conflict that she knew or reasonably should have known existed, (2) he did not waive any conflict, and (3) his lawyer, Saunders, had an actual conflict of interest. This is sufficient under *Wood v. Georgia* to establish the merits of his claim that he was deprived of his Sixth Amendment right to representation that is free of conflicts of interest. Prejudice is therefore presumed, and Mickens is entitled to a new trial.[4]

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[4] Mickens also argues that he is entitled to relief under a straightforward application of the *Sullivan* test, that is, he has shown both actual conflict and adverse effect. Because the presence of an actual conflict is sufficient to presume prejudice in the circumstances of this case, we need not consider the question of adverse effect.

III.

Mickens next argues that the district court erred in rejecting his claims for ineffective assistance of counsel based on his trial counsels' inadequate pretrial investigation [F.3d 218] and failure to request a psychiatric evaluation for the resentencing. The first of these claims is that counsel were ineffective because they failed to investigate (or to request an investigator) for the purpose of gathering evidence for a consent defense and for use in mitigation at sentencing. The district court held that Mickens' claims of inadequate investigation were defaulted because he had not fairly presented them to the Virginia courts. *See Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997). We agree with the district court. *See Mickens*, 74 F. Supp. 2d at 598.

Mickens' second ineffective assistance claim focuses on counsels' failure to obtain a mental health expert to perform an evaluation for the resentencing. The district court rejected this argument on the merits. On appeal Mickens has not shown us what a mental health expert would have discovered beyond what counsel already knew at the time of the resentencing. Moreover, this claim was also adjudicated against Mickens on the merits in state court. *See Williams v. Taylor*, 120 S. Ct. 1495, 1516 (2000) ("The relevant provision, 28 U.S.C. § 2254(d)(1) (1994 ed., Supp.111), prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." (quoting 28 U.S.C. § 2254(d)(1)). We also reject this claim.

IV.

Mickens argues that the evidence was insufficient to prove attempted forcible sodomy. He further contends that absent



sufficient proof of the underlying predicate offense, the capital murder conviction cannot stand. The district court concluded that this claim was defaulted because it was not fairly presented to the state courts. *See Matthews*, 105 F.3d at 911. Again, we agree with the district court. *See Mickens*, 74 F. Supp. 2d at 597.

V.

In his reply brief Mickens raises the argument that the ineffective assistance of his state habeas counsel excuses the default of additional ineffective assistance of counsel claims raised for the first time in his federal habeas petition. We have held that ineffective assistance by state habeas counsel fails to establish cause, *see Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997) (en banc) ("Because [petitioner] has no right to effective assistance of counsel in his state habeas proceedings, he cannot demonstrate cause to excuse the procedural default of his claims that his trial and appellate counsel were constitutionally ineffective."), *cert. denied*, 522 U.S. 1100 (1998), and the district court held the additional claims defaulted on this ground. We adopt the district court's analysis on this issue. *See Mickens*, 74 F. Supp. 2d at 595.

VI.

A certificate of appealability is issued. The judgment of the district court is reversed because Walter Mickens' lead trial counsel had a conflict of interest that the judge appointing counsel failed to look into. On remand the district court will grant the writ of habeas corpus unless the Commonwealth of Virginia retries Mickens within 180 days of the issuance of our mandate.

*REVERSED.*

WIDENER, Circuit Judge, dissenting:

I respectfully dissent. Because Mickens has failed to establish that his attorney's conflict of interest adversely affected his representation, I would affirm the decision of the district court and deny Mickens' petition for habeas corpus relief. [F.3d 219]

I.

I accept, for the purposes of argument, the majority's conclusion that Mickens' attorney labored under an actual conflict of interest. I must disagree, however, with the majority's conclusion that the Supreme Court's decision in *Wood v. Georgia*, 450 U.S. 261 (1981), relieves Mickens from his burden of establishing that his attorney's conflict of interest adversely affected his representation.

As the majority has noted, a criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel unhindered by conflicts of interest. *Wood*, 450 U.S. at 271; *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991). The general standard for ineffective assistance of counsel has most clearly been articulated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, a petitioner alleging ineffective assistance of counsel must establish, (1) that his attorney's representation fell below an objectively reasonable performance and (2) that the inadequate performance prejudiced the petitioner's case. *Strickland*, 466 U.S. at 687. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. This constitutional standard for establishing ineffective assistance of counsel applies equally in collateral habeas corpus proceedings as it does on direct appeal. *Strickland*, 466 U.S. at 697.



Even as it clarified the applicable standard for ineffective assistance of counsel, however, the *Strickland* Court harmonized existing case law and noted exceptions to the new standard it articulated, recognizing special circumstances addressed by its prior decisions. The *Strickland* Court recognized that a claim of ineffective assistance of counsel predicated on a defense attorney's conflict of interest presents a special case. *Strickland*, 466 U.S. at 692. To establish ineffective assistance of counsel predicated on a conflict of interest a defendant must establish only that (1) his attorney labored under an actual conflict of interest that (2) adversely affected the representation. See *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). After a defendant satisfies this two-part test, prejudice is presumed and a defendant need not show that the conflict altered the outcome of the proceeding. *Sullivan*, 466 U.S. at 349-50.

In *Wood*, the Court addressed a conflict of interest issue apparent on the face of the record even though the conflict had not been addressed below. *Wood*, 450 U.S. at 262-63. Because the case arose as an appeal from a revocation of probation, the Court analyzed the conflict under due process, rather than Sixth Amendment grounds. *Wood*, 450 U.S. at 271-72. Nonetheless, the Court cited *Sullivan* for the proposition that the Sixth Amendment ensures a right to counsel free from conflict of interest. *Wood*, 450 U.S. at 271. Without the benefit of briefing, the Court could not determine whether counsel labored under an actual conflict of interest. *Wood*, 450 U.S. at 272. The record was adequate to establish, however, "that the possibility of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the [trial] court a duty to inquire further." *Wood*, 450 U.S. at 272. The *Wood* Court thus clarified that trial courts have an obligation to inquire into potential conflicts of interest when they know or reasonably should know of a conflict.

The Supreme Court remanded the case and instructed the trial court "to determine whether the conflict of interest that this record strongly suggests actually existed" but did not expressly instruct the [F.3d 220] trial court to identify an adverse effect. *Wood*, 450 U.S. at 273. The majority concludes that, because the *Wood* Court did not expressly require the trial court to identify an adverse effect on remand, a defendant need not establish an adverse effect when a trial court had a duty to inquire into a conflict of interest but fails to do so. Thus, the majority reads *Wood* to have overruled the second part of *Sullivan*'s two-part standard by implication. "Overruling by implication is not favored." *Catawba Indian Tribe of South Carolina v. South Carolina*, 978 F.2d 1334, 1347 (4th Cir. 1992).

At the risk of self immolation, I should say that the decision in *Wood*, to me, has not turned out to be a model of clarity. The *Wood* Court was concerned about the potential conflict of interest faced by a defense attorney hired and compensated by the defendants' employer whose interests appeared to diverge from their own. *Wood*, 450 U.S. at 269-71. The Court cited *Sullivan* for the proposition that a defendant's right to effective counsel includes a right to "representation that is free from conflicts of interest." *Wood*, 450 U.S. at 271. The Court then noted that "[o]n the record before us, we cannot be sure whether counsel was *influenced in his basic strategic decisions* by the interests of the employer who hired him." *Wood*, 450 U.S. at 272 (emphasis added). If the defendants' attorney had been so influenced, the Court ruled, "the due process rights of petitioners were not respected." *Wood*, 450 U.S. at 272. That language may only mean that the Court required not just an actual conflict, but also an indication that the conflict adversely affected the counsel's basic strategic decisions. When read in this light, the *Wood* Court's terse instruction to the trial court on remand does not bear the Constitutional weight the majority ascribes to it. As this court has recognized, the two requirements of



the *Sullivan* test, "an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap." *United States v. Tatum* 943 F.2d 370, 375 (4th Cir. 1991). Thus, the *Wood* Court's instruction to the trial court amounts to no more than shorthand for an explicit two part test that the *Wood* Court did not even have occasion to quote in its majority decision much less to overrule. Indeed, *subsequent to Wood*, found in 450 U.S. 261, the holding of *Sullivan* was underscored by its citation in *Strickland*: "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 466 U.S. at 692 (quoting *Sullivan*, 446 U.S. at 348).

Only in extraordinary circumstances not present here has the Supreme Court reversed a conviction because of an actual conflict of interest without a determination that the conflict of interest adversely affected the representation. The only occasions I have found in which the Supreme Court has not inquired into an adverse effect are those cases in which a defense attorney objected to the conflict of interest and the trial court nonetheless declined to address the conflict. In such a case, the Supreme Court has held, reversal is required without inquiry into either actual conflict or adverse effect. See *Holloway v. Arkansas*, 435 U.S. 475, 488-89 (1978).

The majority decision is also contrary to this court's interpretation of *Wood*. In *United States v. Gilliam*, 975 F.2d 1050 (4th Cir. 1992), this court addressed *Wood* without concluding, as does the majority here, that the Supreme Court had partially overruled *Sullivan*. In *Gilliam*, the defendant did not raise the issue of conflict resulting from multiple representation until he obtained new counsel at the sentencing phase of his trial and, as a result of his delay, the trial court declined to conduct a [F.3d 221] hearing into the possibility

of conflict. *Gilliam*, 975 F.2d at 1054. On appeal, this court concluded that the defendant had alleged an actual conflict and noted that "if the court is aware, or should be aware, of a particular conflict, it should conduct a sua sponte inquiry into its existence." *Gilliam*, 975 F.2d at 1053 (quoting *United States v. Akinseye*, 802 F.2d 740, 744 (4th Cir.1986)). Without citing *Wood*, the court held that "failure of the court to make inquiry under Rule 44(c) is not, standing alone, sufficient to require reversal of a conviction" and remanded to the district court to conduct a hearing into the conflict. *Gilliam*, 975 F.2d at 1053-54. The court cited the *Sullivan* two-part test as the applicable standard. See *Gilliam*, 975 F.2d at 1054 n.5. Rather than reverse, this court remanded, noting that "we do not mean to dictate the result to be reached by the lower court" on remand, and left open the possibility that the district court might deny the claim on the grounds that there was "no suggestion that the alleged conflict *impaired the ability of counsel* to present the case to the jury." *Gilliam*, 975 F.2d at 1054 (emphasis added).

Again, in *Beaver v. Thompson*, this court noted that "[t]o prevail on a claim of conflict of interest, Beaver must present convincing evidence of an actual conflict and a resulting adverse effect on performance." 93 F.3d 1186, 1192 (4th Cir. 1996). This court applied the two-part *Sullivan* test without citing *Wood* in a case where the defense attorney was a part-time prosecutor for the neighboring county and where the local trial court would presumably have been aware of the potential conflict.

The majority relies on language in *United States v. Tatum* that "[i]n *Wood v. Georgia*, the Court flatly stated that a conflict situation which is not addressed by the trial court requires reversal." *Tatum*, 943 F.2d at 379 (citations omitted). The *Tatum* court cited *Wood* in response to an argument, raised by the government and accepted by the district court, that the court's review of the conflict of interest issue was



premature because facts of record had not yet been developed. *Tatum*, 943 F.2d at 379. The implication was that the defendant would be free to raise the issue on collateral habeas corpus review rather than on direct appeal. Nonetheless, the *Tatum* court cited the two-part test of *Sullivan* as the applicable standard. *Tatum*, 943 F.2d at 375. The court then applied the test concluding that "known facts lead inevitably to the conclusion that [defendant's counsel] had unacceptable conflicts of interest" and "that *pretrial strategies were adversely affected* by those conflicts." *Tatum*, 943 F.2d at 380 (emphasis added). The court concluded that when, as in the case before it, "the record supports these conclusions, we may confront the issue on direct appeal." *Tatum*, 943 F.2d at 380 (citing *Wood*, 450 U.S. at 272). Thus, contrary to the majority's holding, *Tatum* expressly upheld and applied the *Sullivan* two-part test and cited *Wood* for the more narrow jurisdictional point that this court could appropriately address the conflict of interest issue on direct appeal.

II.

Mickens asserts that, when a trial court has failed to inquire into a potential conflict even though it knew or should have known of the conflict, footnote 18 of the *Wood* decision requires automatic reversal without any inquiry into the existence of either an actual conflict or an adverse effect. See, e.g., *United States v. Levy*, 25 F.3d 146, 153 (2nd Cir. 1994); *Unites States v. Burney*, 756 F.2d 787, 791 (10th Cir. 1985). The relevant footnote states that "*Sullivan* mandates a reversal when the trial court has failed to make an inquiry even though it "knows or reasonably should know that a particular conflict exists."' *Wood*, 450 U.S. at 273 n.18 (internal quote from *Sullivan*, 446 U.S. at 347). [F.3d 222]

The majority declines to reach Mickens' argument about footnote 18 because it concludes he has identified an actual conflict and that the *Wood* Court's instruction to the trial

court on remand eliminates the requirement of an adverse effect. See Majority opinion at 212 n.3. On its face, the majority's rule is distinct from the automatic reversal rule in that it requires a reviewing court to find that an actual conflict of interest existed before it may reverse a conviction. See Majority opinion at 210-11. In practice, however, the rule adopted by the majority, which eliminates the adverse effect requirement when a trial court fails to inquire into a conflict about which it should have known, is functionally equivalent to the automatic reversal rule.

In the absence of an objection from defense counsel, the trial court need not conduct an inquiry unless it "knows or reasonably should know that a *particular* conflict exists." *Sullivan*, 446 U.S. at 347 (emphasis added). In most cases, the same facts that would lead an appellate court applying Mickens' automatic reversal rule to conclude that the trial court should have been aware of a "particular conflict" would also lead a court applying the majority's rule to conclude that an actual conflict existed. Under either rule, the result is reversal of the defendant's conviction. In this case, for example, the majority finds that the trial court should have been aware of the conflict because Mickens faced charges which might require his defense counsel to counter evidence about the victim and the impact of the murder on the victim's family. See majority opinion at 212. By the same token, the majority finds an actual conflict because Mickens' counsel was obligated to investigate and to consider using evidence about the victim to challenge the nature of the crime and the impact of the murder on the victim's family. See majority opinion at 216-17.

For the same reasons that I reject the majority's proposed rule, which requires automatic reversal in practice, I must reject the rule asserted by Mickens, which requires automatic reversal on its face. Despite Mickens' assertions, footnote 18 of *Wood* can not mean that automatic reversal is required when a trial court fails to inquire into a conflict about which it



knew or should have known. That rule would be inconsistent with the manner in which the *Wood* Court disposed of the case before it. In *Wood*, the Court ruled that the "possibility of a conflict of interest was sufficiently apparent . . . to impose upon the [trial] court a duty to inquire further" and noted that the trial court had failed to conduct such an inquiry. *Wood*, 450 U.S. at 272. These holdings satisfy the predicates necessary to trigger the automatic reversal rule asserted by Mickens. Nonetheless, the *Wood* Court chose to remand the case before it to the trial court for an inquiry into the conflict rather than to reverse the trial court's decision. *Wood*, 450 U.S. at 273.

I should add that the footnote language upon which Mickens relies should be considered as a response by the *Wood* majority to Justice White's dissent, not an attempt to create a new rule requiring automatic reversal. Justice White argued that the Court did not have jurisdiction to address the conflict of interest apparent from the record because the conflict had not been raised in the courts below. *Wood*, 450 U.S. at 280. In response, the *Wood* Court's footnote 18 defended its jurisdiction by indicating that the trial court's failure to conduct an inquiry constituted error under the rule of *Sullivan* and noting that *Sullivan* did not prohibit "the raising of a conflict-of-interest problem that is apparent in the record." *Wood*, 450 U.S. at 273 n.18 (quoting *Sullivan*, 446 U.S. at 347). Subsequent decisions have cited *Wood* for this procedural point. See *Izumi Seimitsu Kogyo Kabushiki Kaisha v. US Philips Corp.*, 510 U.S. 27, 33 (1993); *Tatum*, 943 F.2d at 380. [F.3 d 223]

III.

Because I disagree with the majority's conclusion that *Wood* has eliminated the requirement that an actual conflict adversely affect the representation and reject Mickens invitation to adopt the automatic reversal rule, I should address briefly whether Mickens has established an adverse effect in this case.

I note, especially, that the majority decision does not take issue with the finding of the district court that Saunders' conflict of interest caused no adverse effect in the representation of Mickens in this case. A reference to the reported opinion of the district court is instructive. Commencing at 74 F. Supp. 2d, page 606, and continuing to page 613, the district court considered each of Mickens' claims of adverse effect: Saunders' failure to raise a consent defense; failure to investigate or raise any negative information about Hall; failure to engage in meaningful plea negotiations; failure to appraise the sentencing court of Hall's pending charges or strained relationship with his mother; failure to pass along information to his co-counsel; and making a deficient investigation. The district court considered each of these items in great detail, and supported its findings with page and exhibit references from the record. Its findings are largely factual, and the majority does not contend they are clearly erroneous.

The majority correctly states that the existence of a conflict presents a mixed question of law and fact subject to de novo review, *Sullivan*, 446 U.S. at 342, and that the district court's factual findings are subject to the clearly erroneous standard. *Fields v. Attorney General*, 956 F.2d 1290, 1297 n.18 (4th Cir. 1992). However, the adverse effect inquiry, in my view, is so heavily fact dependent that I believe considerable deference must be given to the findings of the district court.

A defendant has established an adverse effect if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another. See *Tatum*, 943 F.2d at 376. Thus both taking affirmative actions and failing to take actions "that are clearly suggested by the circumstances" can indicate an adverse effect. *Tatum*, 943 F.2d at 376. Based on our holding in *Tatum*, I agree with the district court's thoughtful articulation



of a three-part standard for showing an adverse effect which, as in any other civil action, Mickens must establish by a preponderance of the evidence. *Mickens*, 74 F. Supp. 2d at 603-4 (citing *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999) (en banc)). First, the defendant must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second the defendant must show that the alternative strategy or tactic was objectively reasonable under the facts of the case. Because prejudice is presumed, the petitioner need not show that the tactic or strategy would have altered the outcome of the trial, rather he must only establish that the alternative "possessed sufficient substance to be a viable alternative." *Freund*, 165 F.3d at 860. Finally, the defendant must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.

Mickens challenges this standard, arguing that neither this circuit nor the Supreme Court has required a petitioner to establish a link between an adverse effect and an actual conflict. Such a link is implicit, however, in the Supreme Court's requirement that a defendant show that "his counsel actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 466 U.S. at 348, 350. As this court has noted, the two requirements, "an actual conflict of interest *resulting in an adverse effect* on counsel's performance, are often intertwined, making the factual analyses of them overlap." *Tatum*, 943 F.2d at 375 (emphasis added).

I conclude that the district court applied the appropriate standard to evaluate the [F.3d 224] adverse effects asserted by Mickens. Because I agree with the district court that many of Mickens' assertions of adverse effect were not viable defense strategies and that those that were viable defense strategies were not linked to his attorney's conflict of interest, I agree that there was no adverse effect from Saunders' conflict of interest.

IV.

To sum up the case, the rule of *Cuyler v. Sullivan* is that in order to prevail in a case such as this ". . . a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 350. That rule was endorsed by the Court explicitly in *Strickland v. Washington*, 466 U.S. at 692: "Prejudice is presumed only if the defendant demonstrates that . . . "'an actual conflict of interest adversely affected his lawyer's performance.'" *Sullivan* was decided in 1980, and *Strickland* in 1984. The majority holds that the intervening 1981 case of *Wood v. Georgia* has changed that rule so that an adverse effect is no longer required. I am of opinion that *Wood* did not change the *Sullivan* rule and, for that reason, I respectfully dissent.



UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 00-4

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WALTER MICKENS, JR.,
*Petitioner-Appellant*,

v.

JOHN B. TAYLOR, Warden,
Sussex I State Prison,
*Respondent-Appellee*.

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Appeal from the United States District Court
for the Eastern District of Virginia,
at Richmond. Robert E. Payne, District Judge.
(CA-98-102-3)

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Argued: December 5, 2000
Decided: February 16, 2001

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OPINION

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Reported at 240 F.3d 348 (4th Cir. 2001)

Before WILKINSON, *Chief Judge*, and WIDENER, WILKINS, NIEMEYER, LUTTIG, WILLIAMS, MICHAEL, MOTZ, TRAXLER, and KING, *Circuit Judges*.

WIDENER, *Circuit Judge*:

In 1993 a jury in the Circuit Court of the City of Newport News, Virginia convicted Walter Mickens (Mickens) of the capital murder of Timothy Hall (Hall). Mickens was sentenced to death. Mickens' federal habeas attorney later discovered during the preparation of Mickens' federal habeas corpus

petition that Mickens' trial counsel had just previously represented Hall on a charge unrelated to Hall's death. Mickens argues that, because of this prior representation, his attorney labored under a conflict of interest that rendered his representation of Mickens inadequate to satisfy Mickens' Sixth Amendment guarantee of effective counsel. Principally, because Mickens has failed to show that such conflict of interest adversely affected the quality of his representation, we deny Mickens' petition for habeas corpus relief. We hold the incidental claims of Mickens are also without merit.

I.

We describe the facts of this crime as they have been summarized by the Supreme Court of Virginia, *Mickens v. Commonwealth*, [F.3d 352] 247 Va. 395, 442 S.E.2d 678, 681-83 (1994). See 28 U.S.C. § 2254(e)(1).

On March 28, 1992, Timothy Hall, age seventeen, lived with his fourteen-year-old friend, Raheem Gordon, and Gordon's father in Gordon's Newport News, Virginia apartment. Hall and Gordon often shared clothes, and Hall was wearing his roommate's Nike brand "Cross Trainer" tennis shoes on that night. Between 7:00 and 8:00 p.m. that evening, Hall drove young Gordon to a party in a nearby apartment building. Hall's stated intention was to return to the party later in the evening, but he never arrived.

Around 8:00 p.m., shortly after Gordon's arrival at the party, two other guests at the party, Vincent West and Bruce Mitchell, left the party and went to a nearby convenience store. After leaving the convenience store, West and Mitchell took their purchases to a public park adjacent to the apartment building in which the party was held. While sitting in the park, West and Mitchell saw a man with a bicycle hiding in some bushes and looking at them. The man was later identified as the petitioner, Walter Mickens.

The following day, Gordon saw Hall's automobile parked near the site of the party in the same place it had been parked



the previous night. On March 30, 1992, two days after the party, a man walking along the James River in Newport News saw a body beneath an abandoned construction company building. The body was lying face down on a mattress under a sheet of plywood. The body was nude from the waist down, except for socks, and its legs were spread apart. Pubic hairs were recovered from the buttocks of the body. There were bloody "transfer" stains on the outsides of the victim's thighs, and there was a white liquid substance close to his anus. The victim was identified as Timothy Hall.

An autopsy revealed that Hall had suffered 143 separate "sharp force injuries." The medical examiner concluded that Hall had bled to death and that 25 of the wounds were fatal, including stab wounds to the lungs, skull and brain, liver, neck and jugular vein. The examiner opined that the fatal wounds may not have caused instant death, that Hall could have lived as long as 30 to 40 minutes after infliction of the last wound and that, during this time, he may have been conscious.

On the evening of April 4, 1992, five days after Hall's body was found, Officer D.A. Seals and Detective Dallas Mitchell of the Newport News police responded to a complaint that a black male traveling on a bicycle had assaulted a juvenile. They soon found Mickens, who is black, riding a bicycle in the parking area of the abandoned construction company building where Hall's body had been found. When Officer Seals displayed his badge and approached Mickens, Mickens fled on his bicycle. Mitchell and Seals followed Mickens and took him into custody as he was being detained by other officers. They arrested Mickens on charges involving the assault on the juvenile.

Mickens agreed to talk with the police after being advised of his Miranda rights. Without telling Mickens how Hall had been murdered, Detective Mitchell told Mickens that he knew Mickens had killed Hall. Mickens denied any involvement in Hall's murder asserting, "You didn't find any knife on me, did

you?" The following morning, the police obtained warrants charging Mickens with the murder and attempted sodomy of Hall. When Officer Seals handed Mickens the warrants, Mickens said, "I accept the warrants; I accept the charges." Seals asked Mickens what he meant by that, and Mickens responded, "Mother f___r, if I told you I accept the warrants that means I'm guilty, don't it?"

On April 7, 1992, the police found Michael Jacobs wearing the Nike brand "Cross Trainer" shoes that Hall borrowed from Gordon and had been wearing when Gordon last saw him alive. Jacobs testified that he bought the shoes from Mickens [F.3d 353] for $5.00 the previous week, the same week Hall's body was found.

At trial, expert witnesses presented by the Commonwealth testified that the pubic hairs removed from Hall's buttocks were from an African-American and were alike in "all identifiable microscopic characteristics" to the pubic hair sample taken from Mickens. Tissue attached to the roots of the hairs indicated that the hairs had been forcibly removed, possibly by the rubbing of the assailant's genitals against Hall's buttocks. A sample of human sperm was recovered from the cover of the mattress on which Hall's body was found. DNA analysis (RFLP type) of the sample revealed that Hall could not have produced the sperm. Mickens' DNA pattern was consistent with the DNA pattern in the sperm, however. According to expert testimony presented by the Commonwealth, approximately one in 27,000 Caucasians, one in 6,000 African-Americans, and one in 2,000 Hispanics could have produced sperm consistent with the sample taken from the mattress.

The Commonwealth also presented the testimony of Tyrone Brister, who had been confined in a holding cell at the courthouse with Mickens on March 26, 1993, about a year after Hall's murder. Brister testified that he had asked Mickens why he was in the holding cell and Mickens answered, "They



said I stabbed somebody 140 something times in the head." Mickens then lowered his voice and said, "which I did." Mickens also told Brister that "they" said he also sodomized the victim and stole his sneakers. Again, Mickens lowered his voice and said, "which I did."

Mickens was convicted of the capital murder of Timothy Hall under a statute making it a capital offense to commit a premeditated murder during or following the commission of attempted forcible sodomy. See Va. Code Ann. § 18.2-31(5). The jury found that the murder of Timothy Hall was outrageously and wantonly vile and sentenced Mickens to death. The Supreme Court of Virginia affirmed. See *Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678 (1994). The United States Supreme Court granted Mickens' first petition for certiorari and remanded the case "for further consideration in light of *Simmons v. South Carolina*, 512 U.S. 154 (1994)." *Mickens v. Virginia*, 513 U.S. 922 (1994). On remand the Supreme Court of Virginia concluded that *Simmons* mandated a new sentencing hearing because "the jury was entitled to be informed of Mickens' parole ineligibility." *Mickens v. Commonwealth*, 249 Va. 423, 425, 457 S.E.2d 9,10 (1995).[1] On February 5-8, 1996, the trial court held a new sentencing hearing. The jury again fixed Mickens' sentence at death. Mickens appealed, the Supreme Court of Virginia affirmed the sentence, *Mickens v. Commonwealth*, 252 Va. 315, 478 S.E.2d 302, 307 (1996), and the United States Supreme Court denied certiorari, *Mickens v. Virginia*, 520 U.S. 1269 (1997). The Supreme Court of Virginia denied Mickens' petition for a writ of habeas corpus on December 15, 1997.

On June 25, 1998, Mickens filed a petition in federal district court for a writ of habeas corpus under 28 U.S.C. § 2254 (2000). While investigating Mickens' case, Mickens' court-

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[1] Mickens previously had been twice convicted of robbery, not to mention other convictions. See Va. Code § 53.1-151(B1).

appointed federal habeas counsel was the first to discover that Mickens' lead trial counsel, Bryan Saunders (Saunders), labored under a potential conflict of interest.[2] The Federal habeas attorney had gone to the Newport News Juvenile and Domestic Relations Court to review Mickens' juvenile case file. While there, counsel also asked the clerk on duty [F.3d 354] for any files involving Timothy Hall. Although juvenile case files are kept confidential under Virginia law, see Va. Code Ann. § 16.1-305, the clerk mistakenly produced Hall's file. Hall's juvenile file revealed that, at the time of Hall's death, Saunders was representing him on assault and concealed weapon charges. The assault charge originated on February 21, 1992, when Hall's mother swore out a warrant alleging that her son repeatedly had grabbed her by her arms and shoved her to the ground. Hall was charged again on March 13, 1992, when the Newport News police found him in possession of a concealed weapon, a serrated bread knife wrapped in paper. When Hall appeared before the Juvenile and Domestic Relations Court on March 20, 1992, Judge Paul Criver, Jr. appointed Saunders to represent Hall on the two charges. A hearing in the matter was continued until April 3, 1992. Sometime between March 20 and March 28, 1992, when Hall was last seen alive, Hall came to Saunders' office for an interview that lasted between fifteen and thirty minutes. They discussed the circumstances surrounding each of the charged crimes.

On Friday, April 3, 1992, four days after Hall's body was discovered, Judge Aundria Foster of the Juvenile and Domestic Relations Court dismissed the charges against Hall, noting that he was deceased. Judge Foster's handwritten order was entered on the individual docket sheet for Hall's case. The docket sheet

[2] We take the facts relating to Saunders' representation of Mickens from the decision of the district court denying Mickens' petition for federal habeas corpus relief. See *Mickens v. Greene*, 74 F. Supp. 2d 586 (E.D. Va.1999).



was a single page that included Hall's full name, his date of birth, the charges against him, an abbreviated history of the proceedings, and the identity of his appointed lawyer, Bryan Saunders. That same day Saunders went to the courthouse for the scheduled hearing in Hall's case, and someone, Saunders does not recall whom, told him that Hall was dead and that the case had been dismissed. There is no evidence that Saunders appeared before Judge Foster on the day that the charges against Hall were dismissed. Mickens was arrested the next day, Saturday, April 4, 1992. On the following Monday, April 6, 1992, Judge Foster, the same judge who handled the dismissal of Hall's case, appointed Saunders to represent Mickens in his trial for the capital murder of Hall. Mickens' arrest warrants, which appear to have been before Judge Foster when she appointed Saunders, charged that "on or about March 30, 1992" Mickens murdered "Timothy Jason Hall, white male, age 17, by stabbing, and during the commission of an abduction, and sodomy as well as robbery."[3] Judge Foster did not inquire into whether Saunders would have a conflict in representing Mickens.

Saunders represented Mickens at the guilt phase of his murder trial and at both of his sentencing hearings. Saunders worked with court-appointed co-counsel, Warren Keeling, but Saunders was responsible for about ninety percent of the workload. Keeling took primary responsibility for the sentencing hearings, however. Neither Saunders nor Keeling represented Mickens on his petition for state habeas corpus relief. Saunders never told Mickens or Keeling that he had represented Hall, and Mickens did not learn about the prior representation until federal habeas counsel discovered it in Hall's juvenile file.

The district court denied Mickens' petition for federal habeas corpus relief. *Mickens v. Greene*, 74 F. Supp. 2d 586

[3] The robbery and abduction charges were later dismissed for lack of probable cause by Judge Foster at Mickens' preliminary hearing.

(E.D.Va.1999). The court rejected Mickens' conflict of interest claim after concluding that "the possible conflict of interest presented by Saunders' successive representation of Hall and Mickens never ripened into an actual conflict nor was Saunders' advocacy impaired thereby." *Mickens v. Greene*, 74 F. Supp. 2d at 615. The district court also rejected Mickens' other claims, including those for ineffective [F.3d 355] assistance of counsel and insufficiency of evidence. Mickens appealed, and, on September 14, 2000, a divided panel of this court reversed the decision of the district court. See *Mickens v.* Taylor, 227 F.3d 203 (4th Cir. 2000).

The Commonwealth's petition for rehearing en banc was granted, and on December 5, 2000, the case was argued before the en banc court. We now affirm.

When this court sits en banc, we review the decision of the district court for error. See 4th Cir.R. 35(c). Because Mickens filed his federal habeas petition after the April 24, 1996, enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, we apply 28 U.S.C. § 2254 as amended by the AEDPA. See *Mueller v. Angelone*, 181 F.3d 557, 565-72 (4th Cir.), *cert. denied*, 527 U.S. 1065 (1999).

II.

A criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel unhindered by conflicts of interest. See *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980); *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991). The Supreme Court has most clearly articulated the threshold for establishing ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, a petitioner alleging ineffective assistance of counsel must establish, (1) that his attorney's representation fell below an objectively reasonable performance and (2) that the inadequate performance prejudiced the petitioner's case.



*Strickland*, 466 U.S. at 687. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. This constitutional standard for establishing ineffective assistance of counsel applies equally in federal collateral proceedings as it does on direct appeal. *Strickland*, 466 U.S. at 697.

Even as the *Strickland* court clarified the applicable standard for ineffective assistance of counsel, however, it recognized special circumstances addressed by its prior decisions and noted exceptions to the new standard it articulated. The *Strickland* Court recognized that a claim of ineffective assistance of counsel arising from counsel's conflict of interest presents a special case subject to the standard articulated by *Cuyler v. Sullivan*, 446 U.S. 335 (1980). See *Strickland*, 466 U.S. at 692. To establish ineffective assistance of counsel on conflict of interest grounds, a petitioner must establish that (1) his attorney labored under "an actual conflict of interest" that (2) "adversely affected his lawyer's performance." See *Sullivan*, 446 U.S. at 348. After a petitioner satisfies this two-part test, prejudice is presumed. *Sullivan*, 466 U.S. at 349.

Mickens presents three alternative arguments for habeas corpus relief on conflict of interest grounds. First, Mickens argues that the trial court's failure to inquire into the extent of his attorney's potential conflict of interest even though the court reasonably should have known of that conflict mandates automatic reversal of his conviction. Second, Mickens argues that, even if the trial court's failure to inquire into his attorney's potential conflict does not require automatic reversal, it relieves him of his burden under *Sullivan* of establishing that the conflict of interest adversely affected his representation. Finally, Mickens argues that he has satisfied both elements of the two-part *Sullivan* test and that the district

court erred in ruling that his attorney did not labor under an actual conflict of interest that adversely affected his representation. We conclude that *Sullivan* requires Mickens to establish both an actual conflict of interest and an adverse [F.3d 356] effect even if the trial court failed to inquire into a potential conflict about which it reasonably should have known. Because we find that Mickens has failed to show an adverse effect, we affirm the decision of the district court and deny Mickens' petition without deciding whether Mickens has demonstrated that his attorney labored under an actual conflict of interest.

Before we examine the merits of Mickens' conflict of interest claim, we address the Commonwealth's argument that his claim is barred under the requirement for exhaustion and the doctrine of procedural default. The exhaustion doctrine bars a claim if it is raised for the first time in a federal habeas petition. See *Breard v. Pruett*,134 F.3d 615, 619 (4th Cir.) (citing *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997)), *cert. denied*, 523 U.S. 371 (1998). The procedural default doctrine bars a claim when the habeas petitioner "fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.'" *Breard*, 134 F.3d at 619 (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 n.* (1991)).

In a case in the procedural posture present here, a petitioner may overcome both the procedural default and related exhaustion bar by showing cause for the default and actual prejudice arising from the asserted constitutional error. See *Breard*, 134 F.3d at 620. A petitioner can establish cause by showing "that the factual basis for [the] claim was unavailable to him at the time he filed his state habeas petition." *Breard*, 134 F.3d at 620; see *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991); *Williams v. French*, 146 F.3d



203, 209 (4th Cir. 1998). The district court concluded that Mickens established cause: "Here, Saunders' silence and state law requirements for secrecy of juvenile court records operated together to preclude Mickens from raising the conflict of interest claims in his state habeas petition." *Mickens v. Greene*, 74 F. Supp. 2d at 600. The Commonwealth argues that if Mickens' federal habeas counsel was able to discover Saunders' prior representation of Hall, then Mickens' state habeas counsel also could have done so. Virginia law, however, requires juvenile court records to be kept confidential and prohibits their production absent a court order. See Va. Code Ann. § 16.1-305. As the district court found, "the fortuitous circumstances by which federal habeas counsel discovered the truth about Saunders' conflict prove beyond question that Mickens did not fail in his duty to inquire in the state court proceedings." *Mickens v. Greene*, 74 F. Supp. 2d at 601 (citing *Amadeo v. Zant*, 486 U.S. 214, 224 (1988)). It was only through a clerk's mistake that federal habeas counsel saw Hall's juvenile court file, and as soon as a supervisor discovered the error, the file was taken from federal habeas counsel. Under these circumstances, we agree with the district court that "the factual predicate for [the conflicts claim] was not available to Mickens in state court nor was it discoverable through the exercise of diligent investigation." *Mickens v. Greene*, 74 F. Supp. 2d at 602. Mickens has established cause.

To establish prejudice adequate to excuse his default, a petitioner must show that his counsel's error created more than the "possibility of prejudice" but instead that it "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). The Supreme Court has identified Sixth Amendment conflict of interest cases as a special circumstance, however, in which prejudice for purposes of the ineffective assistance of counsel inquiry is presumed once a petitioner establishes both of the [F.3d 357] two aspects

of the underlying conflict of interest claim. See *Sullivan*, 446 U.S. at 349-50. Our inquiry as to prejudice for purposes of excusing Mickens' default thus incorporates the test for evaluating his underlying conflict of interest claim. See *Williams*, 146 F.3d at 212-13 (analyzing actual prejudice for purposes of procedural default by examining the merits of petitioner's conflict of interest claim); *Rosenwald v. United States*, 898 F.2d 585, 587 (7th Cir.1990) (concluding that to show actual prejudice the petitioner must establish the merits of his *Sullivan* claim). Accordingly, we turn to the merits of Mickens' conflict of interest claim.

III.

A.

Mickens argues that the Sixth Amendment mandates automatic reversal of his conviction because the trial court reasonably should have known of his attorney's potential conflict of interest but failed to inquire into the extent of that conflict. Mickens cites *Holloway v. Arkansas*, 435 U.S. 475 (1978), and *Wood v. Georgia*, 450 U.S. 261 (1981), in support of this proposition. We accept for purposes of discussion, without deciding the issue, that Judge Foster, who appointed Saunders to represent Mickens, reasonably should have known that Saunders labored under a potential conflict of interest arising from his previous representation of Hall.

We are of opinion, however, that the decision in *Holloway v. Arkansas* does not require automatic reversal of Mickens' conviction. *Holloway* dealt with a specific circumstance, not present here, in which a trial court failed to inquire into a potential conflict despite defense counsel's objections. In *Holloway*, the trial court required one defense attorney to represent three co-defendants in a joint trial despite repeated objections by defense counsel that the joint representation hampered his ability to represent any of the defendants adequately. Notably, he could not cross-examine any of those



from whom he had confidential information. *Holloway*, 435 U.S. at 478-80. The *Holloway* trial court declined to inquire into prejudice arising from the conflicted representation. While the state court affirmed the two convictions, the Supreme Court reversed the convictions based solely on the trial court's failure, in the face of repeated representations by the single attorney of his impossible burden, to either ascertain the risk of joint representation or appoint separate counsel. *Holloway*, 435 U.S. at 483-84.

The *Holloway* Court cited two reasons for finding a Sixth Amendment violation under such circumstances: the obligation of the trial court to protect the right of the accused to have effective assistance of counsel and the trustworthiness of defense counsel's objection that his representation is hampered by a conflict of interest. *Holloway*, 435 U.S. at 484-85. An objection raised by defense counsel is particularly persuasive evidence of a Sixth Amendment violation because: (1) defense counsel is in the best position to evaluate his potential conflicts of interest; (2) defense attorneys are obligated to inform the court of conflicts of interest; and (3) attorneys are officers of the court whose declarations to the court are "virtually made under oath." *Holloway*, 435 U.S. at 485-86. The Court stated "We find these considerations persuasive." We think that the rule of *Holloway* should not apply in a case such as this where there has been no showing of any hindrance of the defense and no objection by the defense to the conflict. In fact, *Holloway* specifically declined to clarify the extent of a trial court's obligation to inquire into a conflict of interest absent an objection by the defense. *Holloway*, 435 U.S. at 483-84.

Following *Holloway*, the Court, in *Cuyler v. Sullivan*, again addressed a trial court's duty to inquire into conflicts of [F.3d 358] interest, noting that a trial court must inquire into a conflict of interest when it "knows or reasonably should know that a particular conflict exists." *Sullivan*, 446 U.S. at 347. The *Sullivan* Court did not extend the *Holloway* reversal rule,

however, beyond the facts of *Holloway* to all circumstances in which the defense did not object to a conflict of interest at trial. Absent such an objection, a petitioner must satisfy the two-part conflict-of-interest standard identified by *Sullivan*, establishing both an actual conflict and an adverse effect. The *Sullivan* Court recognized this distinction when it noted that "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348.[4]

Mickens argues that a footnote in *Wood v. Georgia* changed the rule of *Sullivan* and extended the automatic reversal rule of *Holloway* to circumstances in which a trial court ignores a conflict about which it reasonably should have known. *Wood*, 450 U.S. at 273 n.18.[5] In *Wood*, the Court addressed a conflict of interest issue apparent on the face of the record even though the conflict had not been addressed below. *Wood*, 450 U.S. at 262-63. Because the case arose as an appeal from a revocation of probation, the Court analyzed the conflict under the due process clause, rather than Sixth Amendment grounds. *Wood*, 450 U.S. at 271-72. Nonetheless, the Court cited *Sullivan* for the proposition that the Sixth Amendment ensures a right to counsel free from conflict of interest. *Wood*, 450 U.S. at 271. Without the benefit of briefing, the *Wood* Court could not determine whether defense counsel in the case before the Court labored under an actual conflict of interest. *Wood*, 450 U.S. at 272. The record was adequate to establish, however, "that the possibility of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the [trial]

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[4] While the cases may seem to emphasize lack of objection, we think that the fact of the associated failure to offer to a defendant an opportunity to object to or waive objection to questionable representation is also of consequence.

[5] That part of the footnote is: "Moreover, *Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' "



court a duty to inquire further." *Wood*, 450 U.S. at 272. The court noted that "any doubt as to whether the court should have been aware of the [conflict] problem is dispelled by the fact that the [prosecution] raised the conflict problem explicitly" at trial. *Wood*, 450 U.S. at 272-73. The *Wood* Court thus clarified that trial courts have an obligation to inquire into potential conflicts of interest when they know or reasonably should know of a particular conflict. The Supreme Court remanded the case and instructed the trial court "to determine whether the conflict of interest that this record strongly suggests actually existed." *Wood*, 450 U.S. at 273. However, and we emphasize, the Court did *not* find a due process violation, rather, the Court held that, "Instead, we remand this case for further findings concerning a possible due process violation." *Wood*, 450 U.S. at 263.

While Mickens, of course, should not be faulted for advocating the adoption of what he argues is an automatic reversal rule in the *Wood* footnote, we are of opinion that the adoption of such a rule requiring reversal in such cases would be an overly literal application of the language in that footnote. We say this for three reasons.[6] [F.3d 359]

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[6] We recognize that one circuit has apparently applied *Wood* to create a rule of automatic reversal for cases in which a trial court has failed to inquire into a conflict about which it reasonably should have known. See *Ciak v. United States*, 59 F.3d 296, 302 (2d Cir. 1995) (reversing a conviction on the grounds that "the Supreme Court in *Wood v. Georgia* stated that *Cuyler*. . . requires reversal where a trial court neglects its duty to inquire about a particular conflict") (citations omitted). Several of the circuits, including our own, have cited the automatic reversal rule but have not applied it to reverse a conviction. See *United States v. Tatum*, 943 F.2d 370, 379 (4th Cir. 1991); *United States v. Crespo de Llano*, 830 F.2d 1532, 1538 (9th Cir. 1987); *United States v. Cirrincione*, 780 F.2d 620, 625 (7th Cir. 1985); *United States v. Burney*, 756 F.2d 787, 791(10 Cir. 1985). One other circuit, however, has read *Wood* as we do. See *Brien v. United States*, 695 F.2d 10, 15 n. 10 (1st Cir. 1982) (rejecting the automatic reversal rule because the *Wood* court "did not require an

First, the decision itself in the *Wood* case, as we have noted, did not reach the merits of the due process issue. The decision remanded the case for further findings concerning a possible due process violation.

Second, footnote 18 in the *Wood* case was in response to the aspect of Justice White's dissent which took issue with jurisdiction to vacate the judgment on a Constitutional ground. Reading that footnote to require reversal in each case in which the trial court has failed to make an inquiry when it might know or should know of a conflict, we think leads to an application of the footnote of the court beyond that which was intended.

Third, in our own case of *United States v. Tatum*, we also *referred* to footnote 18 in *Wood*, *Tatum*, 943 F.2d at 379, but we *applied* the rules of *Strickland* and *Sullivan*, that there are two requirements for relief in such cases, "an *actual conflict* of interest resulting in an *adverse effect* on counsel's performance," *Tatum*, 943 F.2d at 375 (italics in original), and we went on to show that there was an adverse effect on counsel's performance, pre-trial strategies were adversely affected in that case, one trial counsel was dependent on another for aid in the defense, and obvious avenues for a full defense were not pursued. *Tatum*, 943 F.2d at 380.

Thus, we are of opinion that the intervening footnote 18 in *Wood* did not change the rule of *Strickland* and *Sullivan*. No adverse effect on the representation of Mickens by his trial attorney having been shown, we hold that there was no Constitutional error shown in this case to require a vacation of Mickens' conviction on account of the fact that Saunders had represented Hall on an entirely unrelated charge at the time of Hall's death at the hands of Mickens.

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automatic reversal of the conviction but merely remanded the case to enable the trial court to conduct the necessary inquiry, the implication being that the convictions would only be overturned if an actual conflict were found").



B.

Mickens now asserts an alternative reading of the *Wood* decision in his opposition to rehearing that we now address. Mickens argues that, even if *Wood* does not compel automatic reversal of his conviction, it relieves him of his burden under *Sullivan* of establishing an adverse effect on his representation in a case where the trial court failed to inquire into a potential conflict about which it reasonably should have known. Mickens notes that the *Wood* Court remanded to the trial court "to determine whether the conflict of interest that this record strongly suggests actually existed" with an instruction to award a new hearing if "an actual conflict of interest existed at that time" but did not expressly require the trial court to identify an adverse effect. *Wood*, 450 U.S. at 274. Mickens concludes from this remand instruction that the *Wood* court eliminated the adverse effect requirement in cases where the trial court failed to inquire into a conflict of interest about which it reasonably should have known. *Wood*, 450 U.S. at 273. Thus, Mickens reads *Wood* to have overruled by implication the second part of *Sullivan*'s two-part standard. However, "[o]verruling by implication is not favored." *Catawba Indian Tribe of South Carolina v. South Carolina*, 978 F.2d 1334, 1347 (4th Cir.1992). [F.3d 360]

But the *Wood* Court noted that "[o]n the record before us, we cannot be sure whether counsel was *influenced in his basic strategic decisions* by the interests of the employer who hired him." *Wood*, 450 U.S. at 272 (emphasis added). *If defense counsel had been so influenced*, the Court stated, "the due process rights of petitioners were not respected." *Wood*, 450 U.S. at 272. After these observations, the Court concluded that it was difficult "to determine whether an actual conflict of interest was present." *Wood*, 450 U.S. at 272. Those comments underscore that the Court was searching the record not just for a conflict of interest, but also for some indication that the conflict adversely affected the

attorney's representation of the defendants. When read in this light, the *Wood* Court's terse instruction to the trial court on remand cannot bear the constitutional weight Mickens ascribes to it. The Court used the term "actual conflict" to refer to a conflict of interest that has adversely affected defense counsel's "basic strategic decisions." *Wood*, 450 U.S. at 272. As this court has recognized, the two requirements of the Sullivan test, "an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap." *Tatum*, 943 F.2d at 375. The *Wood* Court's instruction to the trial court amounts to no more than shorthand for an explicit two-part test that the *Wood* Court did not even have occasion to quote in its majority decision, much less to overrule. Thus, we hold that *Wood* does not relieve Mickens of showing an adverse effect on his attorney's representation.

C.

We now turn to Mickens' argument that the district court erred in deciding that any actual conflict of interest did not adversely affect his representation by Saunders. Because *Sullivan* requires Mickens to demonstrate both an actual conflict and an adverse effect and because we find that Mickens has failed to identify an adverse effect, as noted, we do not reach his argument that he has established an actual conflict of interest.

Conflicts claims present "mixed questions of law and fact that we review de novo." *Williams v. French*, 146 F.3d 203, 212 (4th Cir.) (citing *Sullivan*, 446 U.S. at 342), *cert. denied*, 525 U.S. 1155 (1999). The district court's factual findings, however, "are subject to the clearly erroneous standard set forth in Rule 52(a), Fed.R.Civ.P." *Fields v. Attorney General*, 956 F.2d 1290, 1297 n.18 (4th Cir. 1992). Because much of the adverse effect inquiry is heavily fact dependent, we believe appropriate deference should be given to the findings of the district court. In this respect, we note that a



significant part of the testimony was taken orally, and the district judge saw the witnesses and heard them testify. We also note that the opinion of the district court was complete, thorough, and thoughtful.

A defendant has established an adverse effect if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another. See *Tatum*, 943 F.2d at 376. Thus, both taking action and failing to take actions "that are clearly suggested by the circumstances" can indicate an adverse effect. *Tatum*, 943 F.2d at 376. An adverse effect can arise at any stage of the litigation including pretrial investigation or entry of a plea. See *Tatum*, 943 F.2d at 376. In this case, Mickens argues that Saunders' continuing duty to Hall prevented him from taking action and pursuing strategies on behalf of Mickens. Of course, *Sullivan* does not require Mickens to establish that he would have prevailed at trial had Saunders pursued the strategies that Mickens now argues Saunders rejected because of his conflict of interest. [F.3d 361]

Based on our holding in *Tatum*, 943 F.2d at 376, we agree with the district court's articulation of a three-part standard for showing an adverse effect which, as in any other civil action, Mickens must establish by a preponderance of the evidence. *Mickens v. Greene*, 74 F. Supp. 2d at 603-04 (citing *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir.1999) (en banc)). We add that *Freund* is not different in any significant way from our cases of *Williams v. French*, 146 F.3d 203, 212-13 (4th Cir. 1998), and *Tatum*, 943 F.2d at 376. First, the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision. In the language of *Tatum*, the petitioner must show that the

alternative strategy or tactic was "clearly suggested by the circumstances." *Tatum*, 943 F.2d at 376. Finally, the petitioner must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.

Mickens challenges this standard, arguing that neither this circuit nor the Supreme Court has required a petitioner to establish a link between an adverse effect and an actual conflict. Such a link is implicit, however, in the Supreme Court's requirement that a petitioner show that "his counsel actively represented conflicting interests" and "that a conflict of interest actually affected the adequacy of his representation." *Sullivan*, 466 U.S. at 350, 349. As this court has noted, the two requirements, "an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap." *Tatum*, 943 F.2d at 375. We conclude that the district court applied the appropriate standard to evaluate the adverse effects asserted by Mickens.

The district court carefully considered each of Mickens' claims of adverse effect. Mickens argues that his attorney failed to raise as a defense that Hall had consented to sodomy; failed to investigate Hall's background or to present any negative information about Hall at trial; failed to engage in meaningful plea negotiations; failed to present evidence at sentencing regarding Hall's pending charges or strained relationship with his mother; failed to share information with his co-counsel; failed to investigate leads indicating an alternative perpetrator of the crime; failed to investigate Hall's juvenile file; and failed to adequately cross-examine a key prosecution witness. The district court considered each of these arguments in detail.

The district court concluded that a consent defense was not viable because of evidence that Hall had been subjected to a choke hold and stabbed some 140 times before or during the act of sodomy or attempted sodomy. *Mickens v. Greene*, 74 F. Supp.2d at 607. In addition, the district court noted that Mickens denied ever meeting Hall. *Mickens v. Greene*, 74 F. Supp.2d at 607. Because Saunders was entitled to rely on the information provided by his client, consensual sodomy was not a viable defense strategy at the time that Saunders made his decision not to pursue it. See *Royal v. Taylor*, 188 F.3d 239, 248-49 (4th Cir.1999); *Roach v. Martin*, 757 F.2d 1463,1476-80 (4th Cir.1985).



Neither was the district court persuaded that Mickens suffered an adverse effect because of Saunders' failure to investigate or to raise negative information about Hall. The district court concluded that Saunders did not possess sufficient information relating to rumors that Hall was a male prostitute to warrant an investigation and that, in any event, presentation of such evidence would have been counterproductive and would have been inconsistent with Mickens' assertions of sympathy for the victim and his family. *Mickens v. Greene*, 74 F.Supp.2d at 608. By the same [F.3d 362] token, the district court concluded that evidence related to Hall's assault charge on his mother would have been of limited value. The only conceivably admissible purpose for the evidence would have been impeachment of Hall's mother at the sentencing hearing after she testified about the extent of her grief. *Mickens v. Greene*, 74 F.Supp.2d at 608. Choosing not to vilify the mother of the victim cannot be the mark of incompetent counsel by any measure. For obvious reasons, questioning the mother on that point would have been an unattractive strategy. Ultimately, Saunders' co-counsel was primarily responsible for the sentencing hearing, was aware of this information, and made the decision not to use it at the sentencing hearing; so this strategic decision was unrelated to Saunders' conflict of interest. *Mickens v. Greene*, 74 F. Supp.2d at 608.

The district court also concluded that Saunders' failure to pursue plea negotiations was not based on his conflict of interest but rather on the unwillingness of the prosecution to

bargain. *Mickens v. Greene*, 74 F. Supp. 2d at 609. The district court found as a nonviable strategy Mickens' argument that evidence should have been introduced as to Hall's claimed assault on his mother, and we agree. Not only was it inconsistent with Mickens' expression of regret for the mother's pain, proving that a decedent has asked for what he got is a defense better reserved for the defense of prosecutions such as murder and manslaughter. *Mickens v. Greene*, 74 F. Supp. 2d at 609-10.

The district court also concluded that Saunders' failure to investigate into matters identified by Mickens was either harmless or unrelated to Saunders' conflict of interest. *Mickens v. Greene*, 74 F. Supp. 2d at 610-12. In particular, the district court attributed Saunders' failure to inquire into leads as to possible alternative perpetrators of the murder to the weak nature of the leads, rather than to Saunders' conflict of interest. *Mickens v. Greene*, 74 F. Supp. 2d at 611-12. The district court also found that Saunders' failure to investigate Hall's juvenile file, while unreasonable, created no adverse effect on Saunders' representation of Mickens because the file contained no information pertinent to Mickens' case. *Mickens v. Greene*, 74 F. Supp. 2d at 611. The district court rejected Mickens' claim that Saunders failed adequately to cross-examine a key prosecution witness as defaulted for failure to raise the issue in state court. *Mickens v. Greene*, 74 F. Supp. 2d at 595-96. In any event, Mickens has failed to establish any link between the failure to adequately cross-examine the witness and Saunders' potential conflict of interest.

Finally, the district court considered and rejected Mickens' contention that Saunders concealed his prior representation of Hall from his co-counsel out of a conflicting personal interest in remaining assigned to the case. *Mickens v. Greene*, 74 F. Supp. 2d at 612-13. We conclude that the district court's findings are largely factual and are not clearly erroneous. Because we agree with the district court that many of Mickens'



assertions of adverse effect were not viable defense strategies and that any viable defense strategies were not linked to his attorney's conflict of interest, we reject Mickens' Sixth Amendment challenge to his conviction based on the theory that the claimed conflict had an adverse effect on the representation of his attorney.

## IV.

Mickens' other allegations of error are easily addressed. Mickens argues that the district court erred in rejecting his claims for ineffective assistance of counsel. Mickens offers two grounds upon which his representation may be found ineffective under *Strickland*: his trial counsels' inadequate pretrial investigation and failure of his trial counsel to request a psychiatric evaluation for the resentencing. The first of these claims is that counsel were ineffective because they failed to investigate or to request an investigator for the [F.3d 363] purpose of gathering evidence for a consent defense and for use in mitigation at sentencing. The district court held that Mickens' claims of inadequate investigation were defaulted because he had not fairly presented them to the Virginia courts. See *Matthews v. Evatt*, *105* F.3d 907, 911 (4th Cir.1997). We agree with the district court. See *Mickens v. Greene*, 74 F. Supp. 2d at 598.

Mickens' second ineffective assistance claim focuses on his counsels' failure to retain a mental health expert to evaluate him for the resentencing. The district court rejected this argument on the merits, it appearing that Mickens had been examined by a psychiatrist on the motion of Saunders. On appeal, Mickens has not established what new information a mental health expert would have discovered beyond what counsel already knew at the time of the resentencing. Moreover, this claim was adjudicated against Mickens on the merits in state court. See *Williams v. Taylor*, 529 U.S. 362 (2000) (ruling that 28 U.S.C. § 2254(d)(1) prohibits federal court from granting habeas corpus relief with respect to claim

adjudicated on the merits in state court unless the resulting decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court). We also reject this claim.

Mickens also challenges the sufficiency of the evidence supporting his conviction for attempted forcible sodomy. He further contends that absent sufficient proof of the predicate offense of forcible sodomy his capital murder conviction under Va. Code Ann. § 18.2-31(5) cannot stand. The district court concluded that this claim was defaulted because it was not fairly presented to the state courts. See *Matthews*, 105 F.3d at 911. Again, we agree with the district court. See *Mickens v. Greene*, 74 F. Supp. 2d at 597.

In his reply brief Mickens raises the argument that the ineffective assistance of his state habeas counsel excuses the default of additional ineffective assistance of counsel claims raised for the first time in his federal habeas petition. We have held that ineffective assistance by state habeas counsel fails to establish cause. See *Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997) (en banc) ("Because [petitioner] has no right to effective assistance of counsel in his state habeas proceedings, he cannot demonstrate cause to excuse the procedural default of his claims that his trial and appellate counsel were constitutionally ineffective."). The district court held Mickens' additional claims defaulted on this ground. We adopt the district court's analysis on this issue. See *Mickens v. Greene*, 74 F. Supp. 2d at 595.

V.

In summary, "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance *necessary to justify reliance on the outcome of the proceeding*." *Strickland*, 466 U.S. at 691-92 (emphasis added). The Sixth Amendment guarantee of counsel does not guarantee an ideal or perfect representation. Thus, *Sullivan* requires a petitioner challenging his conviction on conflict of



interest grounds to establish that his attorney's conflict of interest adversely affected his lawyer's performance. The Supreme Court's decision in *Wood* does not relieve a petitioner of this burden, even when the trial court has failed to inquire into a potential conflict about which it reasonably should have been aware. Subsequent to *Wood*, the *Strickland* Court considered the arguments with respect to a rule of prejudice in conflict of interest cases but explicitly rejected a *per se* rule and found the rule to be "an actual conflict of interest adversely affected his lawyer's performance." *Strickland*, 466 U.S. at 692. We reject the automatic reversal rule and conclude that Mickens must establish an adverse effect arising from his attorney's conflict of interest. [F.3d 364] We deny the other arguments of Mickens for the reasons stated above, and we deny his petition for habeas corpus relief.

Accordingly, the judgment of the district court is

*AFFIRMED.*[7]

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[7] The theme of the dissent is candid and is repeated in various forms and wordings from time to time. At first appearance, at p. 364, it is

> When a trial judge ignores an apparent conflict, a defendant need *only* show that his lawyer labored under an actual conflict to establish a Sixth Amendment claim. The defendant is *not required* to show that the actual conflict adversely affected his lawyer's performance. (Italics added.)

While the theory is laudable, it searches for a perfect trial rather than a fair trial. It would plainly require a new trial although there is no adverse effect on the attorney's performance. So, even a defense as brilliant as that of Erskine would be impossible to justify if a technical conflict existed which had no effect on the performance. We do not believe that this is the law, and are of opinion that a technical conflict, as here, which had no effect on the performance of the attorney, is not such a structural error that vacation of a conviction by way of habeas corpus is called for.

MICHAEL, *Circuit Judge*, dissenting:

The lawyer appointed to defend Walter Mickens on a capital murder charge in Virginia had been representing the murder victim on criminal charges at the time of his death. The state judge who made the appointment was involved in both cases and knew or should have known of the apparent conflict. No one told Mickens about the conflict problem, so he could not object. Once the back-to-back representation came to light after Mickens had been sentenced to death, the apparent conflict proved to have been a real one. None of this poses a problem, according to the majority, because the lawyer did a passable job in defending Mickens. I respectfully dissent because there is a serious Sixth Amendment violation. A trial judge has a constitutional duty to look into an apparent conflict, even if there is no objection. *See Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980). When a trial judge ignores an apparent conflict, a defendant need only show that his lawyer labored under an actual conflict to establish a Sixth Amendment claim. The defendant is not required to show that the actual conflict adversely affected his lawyer's performance. Here, the judge who appointed the lawyer for Mickens ignored the apparent conflict; and, as it turns out, the lawyer was actually saddled with a genuine conflict while he represented Mickens. Mickens's Sixth Amendment right to conflict-free counsel was therefore violated, and he is entitled to a new trial.

I.

On March 20, 1992, Bryan Saunders was appointed to represent Timothy Hall on assault and concealed weapon charges pending in Newport News, Virginia. (It was Hall's mother who had accused him of assaulting her.) Hall met promptly with Saunders, and they discussed the circumstances surrounding each of the charged crimes. Within a matter of days, on March 30, 1992, Hall's nude body was found near the James River, and foul play was evident. The gruesome nature of the crime against Hall was prominently reported by the



news media. On April 3, 1992, state judge Aundria Foster dismissed the charges against Hall on account of his murder. Judge Foster's handwritten order of dismissal was entered on a single-page docket sheet that identified Saunders as Hall's lawyer. The next business day Judge Foster appointed Saunders to represent Mickens, who had been charged in Hall's murder. Despite the fact that Saunders was representing Hall on criminal charges at the time of his death, Judge Foster did not make any inquiry into whether Saunders would have a conflict in representing Mickens. As the district court concluded, Judge Foster knew or should have known of the "apparent possible conflict." *Mickens v. Greene*, 74 F.Supp. 2d 586, 613-15 (E.D. Va.1999). [F.3d 365]

Because Saunders's loyalty was subject to question when he was appointed to represent Mickens, Saunders himself had the duty to inform Mickens of his prior representation of Hall and to give Mickens the opportunity to decline his services. *See* Va. Code Prof'l Responsibility DR5-105(A) (Michie 1992). Saunders, however, said nothing to Mickens, or to the court for that matter. Saunders went on to represent Mickens at the guilt phase of his murder trial and at sentencing. Although Saunders was assisted by court-appointed co-counsel, Saunders was responsible for about ninety percent of the workload. Saunders never disclosed to his co-counsel that he had represented Hall. Several years after Mickens had been sentenced to death, Mickens's federal habeas counsel stumbled onto the fact that Saunders was representing the murder victim (Hall) at the time of the offense. That is the only reason we have this case today.

II.

The Sixth Amendment guarantees a defendant in a criminal case the right to effective assistance of counsel, and this includes the right to a lawyer who is free of conflicts of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980). Trial judges have a special duty to enforce the right to conflict-free counsel. *See generally Holloway v. Arkansas*, 435 U.S.

475, 484 (1978) (emphasizing that "'[u]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused'") (quoting *Glasser v. United States*, 315 U.S. 60, 71 (1942)). A series of three Supreme Court cases have clarified the duty of trial judges in policing conflict situations and have established what a defendant must show to obtain a new trial when the judge has ignored an apparent conflict.

In *Holloway* a public defender representing three defendants in a robbery and rape case moved on conflict grounds to have separate counsel appointed before the trial began. The trial judge "failed to take adequate steps" to explore the risks of a conflict and denied the motion. *Holloway*, 435 U.S. at 487. The Court held that when a trial judge fails to inquire in such a circumstance, prejudice to the accused is presumed, and automatic reversal is warranted. In other words, the defendants were not required to show that their lawyer labored under an actual conflict of interest or that an actual conflict adversely affected his performance. *See id.* at 488-89. The *Holloway* Court explicitly left open the question of whether (or under what circumstances) the Sixth Amendment imposes an *independent* duty on a trial judge to inquire into a potential conflict when there is no objection or motion. *See id.* at 483-84.

*Holloway* was followed by *Cuyler v. Sullivan*, 446 U.S. 335 (1980), where two privately retained lawyers represented three defendants who were accused of the same murders but tried separately. In *Sullivan* the only defendant to be convicted claimed that his right to conflict-free counsel had been violated even though there was no timely objection to the multiple representation. The Court said that the defendant's claim raised the issue "expressly reserved in *Holloway v. Arkansas*," that is, "whether a state trial judge must inquire into the propriety of multiple representation even though no party lodges an objection." *Sullivan*, 446 U.S. at 345. The Supreme Court



held that "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* at 347. In other words, a trial judge has a constitutional duty to inquire when a conflict is sufficiently apparent. Because the situation in *Sullivan* did not suggest that the trial judge should have reasonably known about any conflict, the judge was under no affirmative duty to inquire. *See id.* For that [F.3d 366] particular situation—when the trial judge has no duty to inquire—the Court in *Sullivan* announced the defendant's burden for establishing a Sixth Amendment violation: he "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348. *Sullivan*, however, did not articulate the defendant's burden when a trial court has a duty to inquire, but fails to fulfill it.

*Wood v. Georgia*, 450 U.S. 260 (1981), answered the question left open in *Sullivan*: more specifically, what must a defendant demonstrate when he did not raise the conflict issue at trial, but the situation nevertheless triggered the judge's duty to inquire and the judge did nothing. In *Wood* two individual defendants in an obscenity case had been represented by a lawyer hired by their employer, and the record suggested that the employer might have been more interested in pressing broader legal principles than in seeking lenient treatment for its employees. *See id.* at 268, 272-74. There was no objection to the representation, but the trial judge was faced with an "apparent" conflict, one that was clearly suggested by the circumstances. *See id.* at 262. Because there was an apparent conflict, *Wood* held that the judge had a constitutional duty to inquire, despite the absence of an objection. *See id.* at 272-74. This is consistent with *Sullivan*, which requires a trial court to "initiate an inquiry" when it "knows or reasonably should know that a particular conflict exists." *Sullivan*, 446 U.S. at 347. In *Wood* the trial court's failure to fulfill its constitutional duty to inquire carried the following consequence, according to the Supreme Court:

> [The state] court should hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier. If the court finds that an actual conflict of interest existed at that time, and that there was no valid waiver of the right to independent counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests.

*Wood*, 450 U.S. at 273-74. Simply put, the petitioners were only required to show an actual conflict. They were not required to show that the actual conflict adversely affected their lawyer's performance.

*Holloway*, *Sullivan*, and *Wood* deal with three separate circumstances in which conflict of interest claims arise under the Sixth Amendment. The first is when a defendant objects to his representation on the basis of a conflict and the trial judge fails to inquire into the merits of the objection. In this situation, the defendant is entitled to automatic reversal and a new trial. *See Holloway*, 435 U.S. at 488-89. The second circumstance is when there is no objection to the representation, but the judge knew or reasonably should have known about an apparent conflict. If the judge fails to inquire in this situation, the defendant is only required to show that his lawyer labored under an actual conflict. *See Wood*, 450 U.S. at 273-74. The third circumstance is when there is no objection, and the conflict is not apparent to the judge. In that case, the defendant must show that his lawyer labored under an actual conflict and that the conflict adversely affected his lawyer's performance. *See Sullivan*, 446 U.S. at 348.

The majority's critical mistake is overlooking the careful distinction the Supreme Court made in *Sullivan* between the second and third situations. The distinction turns on whether the trial court faces an apparent conflict. The majority ignores this distinction and concludes that unless there is an objection no matter how obvious the conflict might appear to the trial



judge—the defendant must still demonstrate both actual conflict and adverse effect [F.3d 367] when the judge has failed in his constitutional duty to inquire.

The majority's mistake begins with its treatment of *Sullivan*. The Supreme Court in *Sullivan* held that whether or not there is an objection, a trial court has a duty to inquire into an apparent conflict. The Court was clear: "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* at 347. The majority erroneously concludes that this statement is nothing more than a recitation of the *Holloway* holding, that is, a trial court must inquire into a conflict when there is an objection. *See ante* at 357-58. I respectfully suggest that the majority's reading is wrong for several reasons. First, if *Sullivan* was simply echoing *Holloway*, surely the Court would have cited *Holloway*. Instead, the Court cited to *Foxworth v. Wainwright*, 516 F.2d 1072, 1076-77 (5th Cir. 1975), and *United States v. Medel*, 592 F.2d 1305,1312-13 (5th Cir.1979), both of which stand for the principle that when a conflict is sufficiently apparent, a trial judge has a constitutional duty to inquire, even if there is no objection.* Second, the Court in *Sullivan* pointed out that the defendant's claim raised the issue "expressly reserved in *Holloway v. Arkansas*," specifically, "whether a state trial judge must inquire into the propriety of multiple representation even though no party lodges an objection."

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* In *Foxworth* the Fifth Circuit vacated a conviction because the trial court failed to inquire into an apparent conflict, even though the record did not reflect an objection. *See* 516 F.2d at 1080 n. 17. Significantly, in these circumstances, the court held that a defendant need only show an actual conflict and need not show adverse effect. *See id.* at 1077 n. 7.

In *Medel* the Fifth Circuit said, "We . . . reject [the defendants'] contention that the trial court was under an affirmative duty to inquire into the possibility of a conflict of interest. Defense counsel . . . never indicated to the trial court that a conflict might exist. *Nor do we find anything in the record that should have alerted the Court to such a possibility.*" 592 F.2d at 1312-13 (emphasis added).

*Sullivan*, 446 U.S. at 345. The Court, therefore, was careful to explain that the defendant's claim raised an undecided issue: whether the trial court has any Sixth Amendment duty to inquire into a conflict situation when there is no objection. The Court decided this issue by declaring that a trial court "must initiate an inquiry" when it "knows or reasonably should know that a particular conflict exists." *Id.* at 347. This statement was not a simple recitation of *Holloway's* holding, but rather a new constitutional rule. Third, the Court's actual analysis of whether "the trial court [knew] or reasonably should [have known]" that a conflict existed shows that the Court was going beyond *Holloway*, where the presence of an objection dictated the outcome. The *Sullivan* Court, in deciding that the trial judge was under no duty to inquire, noted that there was no objection to the representation *and* that the defense strategy did not suggest a conflict. *See Sullivan*, 446 U.S. at 347. If the defendant's Sixth Amendment claim had been only a *Holloway* claim, the lack of an objection would have (by itself) defeated the claim. There would have been no reason for the Court to explain that the defense strategy did not suggest the presence of any conflict. Fourth, the majority's reading of *Sullivan* is contrary to the plain language of the holding in the case. The Supreme Court said that a trial court has a duty to inquire if it "should have known" about a conflict. This means that the trial court's duty to inquire is not limited to situations where there is an actual objection. Accordingly, it is clear that *Sullivan* held that in the absence of an objection, a trial judge still has a duty to inquire if the conflict is sufficiently apparent.

In light of *Sullivan* the majority's analysis fails as a matter of logic. The majority holds that in every case where there was no objection, the convicted defendant (in [F.3d 368] order to obtain relief) must show actual conflict and adverse effect, regardless of whether there was an apparent conflict when the case was tried. Under the majority's rule, it makes no difference whether the trial judge had a constitutional duty to inquire because the defendant must always prove the same two



conditions. *Sullivan*, however, dictates that there is a distinction between cases in which the trial judge has a duty to inquire and those in which he does not. As a result, it is simply wrong to hold every defendant to the same burden regardless of whether the trial court was under a duty to investigate an apparent conflict. *Wood v. Georgia* makes that clear.

This brings me to the majority's next critical mistake, its treatment of *Wood v. Georgia*. The plain language of *Wood* provides that when a trial court fails to fulfill its constitutional duty to inquire and there was no objection, a defendant is only required to establish an actual conflict. *Wood*, 450 U.S. at 273-74. The majority does not deny that *Wood*'s remand instructions say as much. The majority, however, advances two reasons why we should not take *Wood* literally, but neither reason is persuasive. First, the majority says that to dispense with a showing of adverse effect, we must read *Wood* to have overruled *Sullivan* by implication. The majority then cites the canon that "overruling by implication is not favored." *Ante* at 359 (citing *Catawba Indian Tribe v. South Carolina*, 978 F.2d 1334, 1347 (4th Cir. 1992)). However, as shown above, *Wood* did not overrule *Sullivan* in any way. Rather, *Wood* simply answered the question left open in *Sullivan*. As a result, the cited canon has no relevance to this case. Second, the majority claims that *Wood*'s reference to "actual conflict" in its holding is mere "shorthand" for requiring both actual conflict and adverse effect. *Ante* at 360. The majority arrives at this conclusion because the *Wood* Court, in discussing the facts of the case, questioned whether the lawyer's performance ("his basic strategic decisions") were influenced by a conflict. *See ante* at 360 (quoting *Wood*, 450 U.S. at 272). The majority concludes that if only an actual conflict was required, the Court would not have made any reference to whether the lawyer's work had been affected. However, the fact that a lawyer's performance was affected can be evidence of an actual conflict. Of course, a defendant can establish that his lawyer labored under an actual conflict without showing a detrimental

effect on the representation. Nevertheless, the fact that a lawyer fell down in his performance may be a strong indication that he did labor under an actual conflict. *See United States v. Tatum*, 943 F.2d 370, 375 (4th Cir.1991) ("The two requirements, an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap."). Therefore, it is not surprising that the *Wood* Court mentioned the quality of performance, even though the holding only required a showing that the lawyer labored under an actual conflict.

The final mistake the majority makes is not acknowledging the importance of *Sullivan* and *Wood* to our system of justice. Again, the Supreme Court distinguishes between the situation where the trial judge ignores an obvious conflict and the situation where the conflict is not apparent. This distinction takes into account the broader harm caused if a judge conducts a trial while ignoring an apparent conflict. Allowing a judge to ignore a conflict "invites disrespect for the integrity of the court," *United States v. Wheat*, 486 U.S. 153, 162 (1988) (internal quotations marks omitted), and "result[s] in the erosion of public confidence in the integrity of the bar and of the legal system." *United States v. Collins*, 920 F.2d 619, 627 (10th Cir. 1990) (internal quotation marks omitted). Courts in our country "have an independent interest in ensuring that criminal trials are conducted within the ethical [F.3d 369] standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat*, 486 U.S. at 160. These concerns require us to treat a defendant's claim that a judge ignored an apparent conflict differently from other conflict of interest claims. The majority, however, treats all conflict claims the same, unless there is an objection. Under the majority's approach a defendant can be required to take a lawyer with divided loyalties so long as he does a tolerable job, and the defendant does not lodge a timely objection. The Sixth Amendment requires more. A criminal defendant has the right *from the outset of proceedings* to a lawyer who is free of



conflicts. Yet the majority would impose no added consequence when a trial judge knowingly allows an unwitting defendant to proceed with a lawyer who has an apparent conflict. In this situation, the majority holds, the defendant's burden is the same as when the conflict is not known to the court until after a guilty verdict. In both cases, the defendant must show both an actual conflict and adverse effect, according to the majority. But under *Sullivan* and *Wood*, when the conflict is obvious and the trial judge ignores his duty (and opportunity) to see that the Sixth Amendment right is protected, the Supreme Court lessens the defendant's burden. He need only show that his lawyer had an actual conflict. This lower burden on defendants encourages trial courts to pay strict attention to fundamental rights, and it confirms that our system is dedicated to ensuring fairness. The majority opinion, which goes against the decisions of the Supreme Court, does nothing to encourage trial courts to take the initiative in policing obvious conflicts of interest. That is unfortunate.

III.

The state judge faced (or actually created) an apparent conflict when she appointed Bryan Saunders to represent Walter Mickens in his capital murder case. The judge should have investigated the conflict problem at once and resolved it before it was too late. Instead, Mickens was put on trial and sentenced to death with a lawyer who labored under an actual conflict of interest. *See Mickens v. Taylor*, 227 F.3d 203, 213-17 (4th Cir. 2000), *vacated & reh'g granted*, Oct. 23, 2000 (explaining why Mickens's lawyer had an actual conflict). Mickens must answer to the charge of capital murder, but he should answer through a lawyer whose representation is not clouded by a conflict. Because Mickens's Sixth Amendment right to conflict-free counsel was violated, I would award him a writ of habeas corpus unless the Commonwealth of Virginia grants him a new trial.

I respectfully dissent, and Judge Motz and Judge King join with me.

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No. 00-9285

IN THE

# Supreme Court of the United States

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WALTER MICKENS, JR.,

*Petitioner*,

v.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON,

*Respondent*.

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?

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## OPINIONS BELOW

The majority and dissenting opinions below are reported as *Mickens v. Taylor*, 240 F.3d 348 (4th Cir. 2001) (*en banc*), and reprinted in the Joint Appendix ("JA") at JA 355. They supplanted panel opinions reported as *Mickens v. Taylor*, 227 F.3d 203 (4th Cir. 2000), reprinted at JA 318. The opinion of the federal district court is reported as *Mickens v. Greene*, 74 F. Supp.2d 586 (E.D. Va. 1999), reprinted at JA 258. An opinion of the Virginia Supreme Court affirming Mickens' conviction and death sentence on direct review is reported as *Mickens v. Commonwealth*, 442 S.E.2d 678 (Va. 1994). This Court granted certiorari and remanded in *Mickens v. Virginia*, 513 U.S. 922 (1994), and the Virginia Supreme Court then ordered a new sentencing hearing, *Mickens v. Commonwealth*, 457 S.E.2d 9 (Va. 1995). Reimposition of the death sentence was affirmed in *Mickens v. Commonwealth*, 478 S.E.2d 302 (Va. 1996), *cert. denied*, 520 U.S. 1269 (1997). A decision of the Supreme Court of Virginia denying a petition for a writ of habeas corpus on December 15, 1997 is unreported. It is set out at JA 126.

## JURISDICTION

The Court of Appeals *en banc* issued its opinion on February 16, 2001 and denied rehearing on March 13. The *certiorari* petition was filed April 6 and granted April 16. Jurisdiction rests on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments provide:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."
>
> "No State shall . . . deprive any person of life [or] liberty . . . without due process of law . . . ."

## STATEMENT OF THE CASE

On August 10, 1992, a Newport News, Virginia grand jury indicted petitioner Walter Mickens, Jr. for the capital murder of Timothy Hall "during the commission of, or subsequent to Attempted Forcible Sodomy." (JA 4.) This was a capital offense by reason of the attempted forcible sodomy allegation.[1] Without that, Hall's killing would have been noncapital murder.[2]

The crime charged was a singularly ugly and terrifying one. The seventeen-year-old Hall had been found stabbed to death, his body bearing 143 "sharp force injuries" of which 25 were fatal.[3] He was lying face down on a mattress under a sheet of plywood, his body nude from waist to socks, with the legs spread apart, pubic hairs on his buttocks and some white liquid near the anus. (240 F.3d at 352.) This was in an area beneath a parking lot that sat on pilings next to an abandoned construction building on the bank of the James River. (*Ibid.*; see also JA 8-9, 15, 34.) The area could be reached from

[1] Va. Code Ann. § 18.2-31(5) (Michie 1992).

[2] The guilt-phase instructions at Mickens' trial told the jury that "[i]f you find that the Commonwealth has failed to prove beyond a reasonable doubt that the killing occurred in the commission of, or subsequent to, attempted forcible sodomy . . . [but do find a malicious, willful, deliberate, premeditated killing], then you shall find the defendant guilty of [the lesser included offense of] first degree murder" and select a sentence of life imprisonment or less (JA 58 [written Instruction 7]; *accord*: JA 60-61 [oral instructions].) See also JA 58 (charge conference) and 74 F. Supp.2d at 606 (explaining that if "Hall was killed during a sexual encounter to which he had consented, . . . [that] would have precluded capital punishment").

[3] The medical examiner described the cause of death as exsanguination from the multiple wounds. (JA 11.) She "opined that the fatal wounds may not have caused instant death, that Hall could have lived as long as 30 to 40 minutes after infliction of the last wound and that, during this time, he may have been conscious." (240 F.3d at 352.)



street level only by descending a steep embankment,[4] and there were no steps near by.[5]

Mickens was tried before a jury in 1993. The prosecution's evidence made a strong case that he was Hall's killer. Five days after Hall's body was found, police officers responding to the report of an assault upon a juvenile saw Mickens exiting the parking lot of the construction building (JA 27) and arrested him when he fled. (240 F.3d at 352.) He was questioned about Hall's murder and revealed knowledge that Hall had been killed with a knife. Served with a warrant for the murder and forcible sodomy of Hall, Mickens admitted guilt to the officer who handed him the warrant and later to a cellmate. The Commonwealth presented evidence of these admissions, testimony that after Hall's death Mickens sold a pair of shoes which Hall was wearing at the time of his death, and expert testimony that the pubic hairs found on Hall's buttocks and sperm found on the mattress under Hall's body were consistent with samples from Mickens. Also, two witnesses identified Mickens as a man they had observed hiding in some bushes in a park near

[4] See JA 35 ("It's a steep incline. I went down—there's a drain pipe that runs down one side of the concrete embankment, and I used the drain pipe about halfway down and then you kind of have to walk on the incline, hold onto whatever you can. . . .¶ . . . There's no steps to get down to that location."), 8 (on both sides of the parking lot overhang, there are bluffs estimated at 30 feet high rising from the river bank to street level), 9 ("I had to jump over the fence . . . . ¶ [I] came down . . . where there was an embankment . . . to the crime scene . . . . ¶ "I don't recall any [trails or] steps being there").

[5] See, *e.g.*, JA 36 (from "the dead end of 29th Street . . . where the Basic Construction lot sits, the parking area that's an overhang . . . [, y]ou can't really get to it from that area . . . "), 8 (between 25th and 30th Streets there are no steps from street level down to the river bank), 231 (between the steps in the low 20s and the steps at 30th, "[y]ou can get down by dropping off the bank").

the location where Hall was last seen alive, not far from the old construction building. (*Ibid.*)

Mickens was represented at trial by two court-appointed lawyers, Bryan Saunders and Warren Keeling. Saunders was lead counsel (74 F.Supp.2d at 599; JA 134, 156) and assumed responsibility for about ninety per cent of the work. (240 F.3d at 354; JA 199, 228; see also JA 150.) Mickens took the stand at trial and denied any involvement in the killing. (74 F.Supp.2d at 607; JA 42-56.)[6] The only evidence presented by defense counsel to support Mickens' denial of involvement was the testimony of his mother that he was

[6] Saunders and Keeling both testified at the later federal habeas hearing that Mickens had insisted on taking the stand and denying guilt despite their advice that he not take the stand. (JA 165, 180-181, 182, 240-241.) Beyond that point, their testimonies diverged sharply, creating an issue of credibility that was not resolved by the courts below. Keeling said that he and Saunders had discussed the possibility of presenting a defense based on the theory that the sexual activity between Hall and Hall's killer was consensual (JA 166 ["THE COURT: "My question is, did you discuss with Mr. Saunders the possibility of presenting as a defense to Mr. Mickens' charges that the sexual encounter started as or was consensual?" THE WITNESS: "We talked about that, Your Honor, yes, we did."]); that they probably discussed "in the context of that, if [*i.e.*, whether] Mr. Mickens was going to not testify or if he was going to change his story as to he didn't do it" (JA 165; see also JA 182); and that Saunders ultimately made the decision not to present a consent defense (JA 166-167). Saunders said that he had never discussed with Keeling what kind of a defense could be presented if Mickens did not testify (JA 240 ["Q. . . . Did you have any conversations with Mr. Keeling about what kind of defense you could present if Walter Mickens did not testify? A. Not that I'm aware of, no."]); that he never spoke with Keeling about a consent defense (JA 211 ["Q. Did you ever speak with Mr. Keeling about a consent defense? A. No. We weren't provided any information that led us to discuss a consent defense."]); and that he never considered a consent defense because there was no foundation for such a defense unless Mickens admitted killing Hall and testified to consensual sexual relations between them (JA 211-212, 243-245; see also JA 148, 153, 218-219).



home before dark every night during the period when the killing must have occurred. (JA 41-42.) Nothing was adduced to point to any alternative possible perpetrator. (74 F.Supp.2d at 610-611.)

The issue of identity was the only one contested at trial. Saunders, who handled almost the entire guilt phase (JA 158)[7] and made all tactical decisions (JA 166-167), presented no alternative argument that, *no matter who killed Hall*, the killing could have occurred in connection with a consensual homosexual liaison and was therefore not capital murder.[8] The jury disbelieved Mickens' claim that he was not the killer and convicted him of capital murder in conjunction with attempted forcible sodomy. (240 F.3d at 353.) Scant mitigation evidence was presented at the jury sentencing hearing, none of it relating to the circumstances of the offense or to the victim. (See JA 79-82.)[9] The jury returned a death sentence. (240 F.3d at 353.)

[7] See JA 5-67. Keeling's only role at trial was to examine Mickens and his mother and cross-examine rebuttal witnesses. (JA 40-58.)

[8] See JA 5-7 (opening statement), 62-69 (closing argument). Saunders did say in closing that it was implausible to believe Mickens had forced Hall to accompany him down a 30-foot bluff to the location where he was killed. But the point of this argument was not that Hall had voluntarily accompanied his killer to the place for consensual sex; it was that Mickens was not the killer because there was no way Mickens and Hall could have gotten to the site together from the area where each was last seen before Hall's death. (JA 68-69.)

[9] Mickens' mother, aunt, sister and a long-time friend testified that Mickens was well-behaved in his dealings with them and treated his sister's and friend's young children with affection and generosity. (6/4/93 Transcript 819-839.) Mickens testified that he had had a deprived childhood, took to drinking beer and sniffing glue, and committed thefts and robberies. (JA 71-77.) He reiterated his denial of any involvement in Hall's killing but said he prayed that Hall would find peace. (JA 78.)

That sentence was set aside after this Court granted *certiorari* and remanded to the Virginia Supreme Court [10] to reconsider a claim under *Simmons v. South Carolina* [11] that the sentencing jury should have been informed about Mickens' ineligibility for parole from a life sentence.[12] At a new sentencing hearing, Mickens was again represented by Saunders and Keeling. (74 F. Supp.2d at 592.) Again they presented little evidence in mitigation and none relating to the crime or to Timothy Hall.[13] The jury made both the "vileness" and the "future dangerousness" findings that are predicates for a capital sentence under Virginia law [14] and fixed Mickens' punishment at death. (74 F. Supp.2d at 592; JA 98.) The trial judge ordered a post-sentence report as the basis for the sentence review prescribed by Virginia law,[15] "to the end that the Court may be fully advised as to whether the sentence of death is appropriate and just." (JA 98; see also JA 99.) After receiving and considering a report that included a Victim Impact Statement (JA 420-422) which quoted Hall's mother as saying that his death had "shattered her world"; that "'all I lived for was that boy'"; and that she would "'never be over the way my son was killed'" (74 F. Supp.2d at 609; JA 421), the judge declined to set aside the jury's sentencing verdict. (74 F.Supp.2d at 592;

[10] *Mickens v. Virginia*, 513 U.S. 922 (1994) (per curiam), vacating *Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678 (1994).

[11] 512 U.S. 154 (1994).

[12] *Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9 (1995).

[13] Mickens' mother testified as at the first penalty trial. A corrections officer and a counselor employed by the Virginia Department of Corrections testified that neither of them had any problems with Mickens in prison. (2/7/96 Transcript 445-458.)

[14] See Va. Code Ann. §§ 19.2-264.2, 264.4(C) (Michie 1995).

[15] See Va. Code Ann. § 19.2-264.5 (Michie 1995).



JA 99-101.) The Virginia Supreme Court affirmed,[16] and later summarily denied Mickens' petition for postconviction relief.

New counsel were appointed to represent Mickens in federal habeas corpus proceedings. (74 F. Supp.2d at 592.) While investigating Mickens' background, federal habeas counsel went to the Newport News Juvenile and Domestic Relations Court ("JDRC") to review his file. Counsel asked the duty clerk for Hall's file as well, and the clerk produced it. This file revealed that at the moment of Hall's death, attorney Bryan Saunders—the same Bryan Saunders who later served as Mickens' court-appointed lead trial counsel—had been representing Hall on charges of assault and possession of a concealed weapon that were slated for trial the following week. (240 F.3d at 353-354.)

Federal habeas counsel requested a copy of Hall's JDRC file. The clerk's supervisor refused, saying that counsel should never have been shown the file in the first place.[17] The supervisor took back the file and refused counsel further access to it. Counsel then obtained a subpoena for the file by reporting what it showed about Saunders' representation of Hall. (74 F. Supp.2d at 600, 602; JA 126-129.)

Following additional investigation, counsel filed a federal habeas petition alleging, *inter alia*, that Saunders' representation of Mickens was tainted by a conflict of interests and violated Mickens' Sixth Amendment rights. The district court held a hearing on the claim, at which these facts appeared without dispute (74 F. Supp.2d at 599 & n.8):

On February 21, 1992, Timothy Hall's mother swore out a warrant for Hall's arrest, charging him with assault and

[16] *Mickens v. Commonwealth*, 252 Va. 315, 478 S.E.2d 302 (1996), *cert. denied*, 520 U.S. 1269 (1997).

[17] Under Va. Code Ann. § 16.1-305 (Michie 1996), JDRC files are confidential and cannot be disclosed without a court order.

battery on her. On March 13, 1992, Newport News police charged Hall with possession of a concealed weapon: a serrated bread knife wrapped in paper. On March 20, 1992, Hall appeared before the JDRC, which appointed Bryan Saunders to represent him on these two charges and continued the case until April 3. (240 F.3d at 354; 74 F. Supp.2d at 599.)

At some time between March 20 and March 28, Hall came to Saunders' office, where Hall and Saunders conferred for fifteen to thirty minutes. (240 F.3d at 354; 74 F. Supp.2d at 599.) The district court found that this attorney-client interview "was confined to the circumstances surrounding each of the charged crimes" (74 F.Supp.2d at 599) but it also found that:

> "Through his representation of Hall, Saunders learned that: (a) Hall had been charged with carrying a concealed weapon at the intersection of 27th Street and Marshall in Newport News; (b) Hall's mother had pressed charges against him for assault, but she was not interested in prosecuting the case . . . ; and (c) Hall was not living with his mother at the time of his death." (74 F. Supp.2d at 606.)

March 28 was the last date on which Hall was seen alive. He was found dead on March 30. (74 F.Supp.2d at 599.) On April 3, Judge Foster of the JDRC dismissed the charges against Hall, noting by hand on Hall's record sheet (which showed conspicuously that Saunders was Hall's lawyer at the time) that defendant Hall was deceased. (74 F.Supp.2d at 599, 613-614; JA 390.) The same day, Saunders appeared at the JDRC for a hearing on the charges against Hall and was informed that Hall was dead and the charges dismissed. (74 F. Supp.2d at 599-606.) On April 4, Mickens was arrested; on April 6, Judge Foster appointed Saunders to represent Mickens in the killing of Hall. (74 F.Supp.2d at 606.) "Judge Foster did not inquire into whether Saunders



would have a conflict in representing Mickens" (240 F.3d at 354; see 74 F.Supp.2d at 613-614), and Saunders accepted the appointment without ever disclosing to anyone else—to Mickens, the criminal trial judge,[18] or Saunders' court-appointed assistant counsel—that Saunders was representing Hall on criminal delinquency charges at the time of Hall's death (74 F.Supp.2d at 600, 606, 612 & n.20).

In the light of these undisputed facts, federal habeas counsel argued to the district court that Judge Foster had appointed Saunders to defend Mickens without inquiring into a potential conflict of interests which was known or should have been known to Judge Foster, and that Saunders was afflicted with an actual conflict of interests throughout his representation of Mickens. Counsel pointed to Saunders' consistent disregard—both before and at Mickens' guilt-phase trial and two sentencing trials—of information and defensive or mitigating strategies that would have cast Saunders' former client, Hall, in a bad light. Hall was killed in a waterside location commonly used for homosexual trysts [19] and located at the base of a precipitous embankment

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[18] After appointing Saunders to represent Mickens, Judge Foster presided at Mickens' preliminary hearing. (JA 254.)

[19] A newspaper article recounting interviews with Hall's acquaintances after his death reported that "One thing that angered his friends was that people might think Hall was a homosexual because his body was found in a place where male homosexuals frequent." (JA 397.) (Another article with a different byline on the same page reported statements by nearby residents that the area under the abandoned construction building parking lot was frequented by vagrants, winos, street people, drug addicts, prostitutes and runaways. [JA 397.]) Saunders admitted that the article may have been among news clippings he collected for the purpose of a possible change-of-venue motion before Mickens' trial (JA 230) but said that he did not remember having read it—and implied that he did not in fact read it—at that time (JA 148-149, 202). Keeling, for his part, acknowledged that he had read the article (JA 179; 1/13/99 Transcript 62-63) and had discussed it with Saunders before Mickens' trial

which would have made it unlikely that Hall could be taken there involuntarily.[20] A consent defense to the charge of attempted forcible sodomy would have reduced the only capital murder charge against Mickens to non-capital murder (whether or not a self-defense claim was also raised to the murder charge itself). (See 74 F.Supp.2d at 606-607.) Yet Saunders did not develop any line of defense based on Hall's possible acquiescence in consensual sex with his killer (see 74 F.Supp.2d at 607); nor did Saunders investigate information suggesting that Hall may have been a homosexual prostitute.[21] Saunders did not investigate leads

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(JA 168-169). Keeling also acknowledged that the mattress on which Hall's body was found had been determined by the police to have on it pubic hairs from several different people, indicating it had been used for sexual activity on previous occasions. (JA 171; and see JA 34.) He testified that the area of Newport News including the abandoned construction building was known for prostitution (JA 169-170) and was "mapped" by the authorities (*i.e.*, designated as an area which convicted prostitutes released on probation were forbidden to reenter) (JA 170). Saunders' testimony was that he did not know whether this was true of the immediate construction-building area (JA 224-225; see also JA 150-151), but he knew that police sting operations directed at prostitutes were taking place in a different area "five or six blocks away." (JA 215; see also JA 151.)

[20] See notes 4, 5 *supra*. Mickens had originally been charged with abducting Hall as well as with attempted forcible sodomy and murder. At the preliminary hearing, the examining judge declined to find sufficient evidence of abduction (JA 254-255), and the prosecution did not thereafter pursue an abduction theory (see 240 F.3d at 354 n.3).

[21] Testifying at the federal habeas hearing, Saunders insisted that he had no information Hall may have been a homosexual prostitute. (JA 202, 215-216, 236.) However, in his deposition he admitted "there had been some statements made by somebody that I thought was in the Commonwealth Attorney's file [reviewed by Saunders before Mickens' trial] that they believed [Hall may have been a homosexual prostitute]" (JA 149) and that "I didn't investigate that aspect at all" (*ibid.*). His explanation for not investigating was that the police "fully investigated



that Hall may have been involved with other persons having a motive to kill him: specifically, a trio of creditors who were apparently hounding Hall shortly before he died,[22] and a prostitute (who might have been male or female, according to different sources) who reportedly frightened Hall into telephoning friends for help on the night and near the scene of his death.[23] (See 74 F. Supp.2d at 610-611.) The facts that

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that aspect, and they couldn't find anything to substantiate, when they were trying to find out who killed him." (JA 149.)

Keeling testified that before Mickens' trial, Keeling and Saunders discussed rumors of Hall's being homosexual and a prostitute and "on the street." (JA 162, 169.) The newspaper article which Keeling testified he discussed with Saunders (but Saunders testified he did not remember [see note 19 *supra*]) reported that because Hall "roamed around so much, he wasn't able to collect a Social Security check until recently when he listed a friend's house . . . as his permanent address. ¶ The checks hadn't started arriving, . . . [Hall's] friends said, but suddenly Hall had money—and excuses. ¶ Alicia Thrash said Hall would be at her house and would suddenly say he had to leave. ¶ 'He would get up for a couple of hours and come back,' she said. 'He would say he was broke, then he would come back and have money . . . .' ¶ 'I think that maybe he was hustling some guys. He just picked the wrong guy,' she said, adding that she thought he was having sex with men for money but preferred women. . . . ¶ Whenever friends teased Hall about having sex with men, he'd deny it, Alicia said. ¶ 'He was ashamed about it but desperate and needed to get by,' she said."

Six years later, a co-owner and an employee of a grocery near the scene of Hall's murder could still recall being told by customers that Hall was a male prostitute. (JA 137.) The co-owner said she heard this from several customers both before and after the murder. (*Ibid.*)

[22] See JA 427, a page of Saunders' handwritten notes on the Commonwealth Attorney's files (read into the record at JA 207), containing the entry: "Tim had been ducking three guys owed money to for about three months. They came to apartment at least once."

[23] Alicia Thrash (Hall's friend quoted in the newspaper article described in note 19 *supra*) might have been a source of information on this subject. Saunders testified at the federal habeas hearing that, before Mickens' trial, Saunders phoned Thrash and asked her about a statement

attributed to her in the Commonwealth Attorney's file, to the effect that other persons than Mickens had been observed in the area where Hall was last seen alive. (JA 252-253.) However, Saunders did *not* ask Thrash about *another statement attributed to her and set out verbatim on the same page* of Saunders' handwritten notes from the same file (JA 253):

> "'everything got real messed up cause when we went to the wake this girl named Stephanie said Timmy had called her Saturday night all scared and nervous, talking about this prostitute was harassing him, saying all this kind of stuff, that he was harassing him over something or other, & then she told him to come pick her up, & he said that he was at the end of 29th St., that's where he said by the construction office, that's where he was at, & she said he called her & told her to come pick him up like that'."

(JA 424, read into the record by Saunders at JA 205-206 and quoted by the District Court in 74 F. Supp.2d at 611.) Another obvious source of information would have been the girl named Stephanie. She is identified as an ex-girlfriend of Hall's in an entry on a different page of Saunders' handwritten notes, indicating that the Commonwealth Attorney's file contained a taped telephone conversation with one Charity Fleming who "supposedly talked to Tim on Sunday [the day *after* Hall was killed] around 6-7—wanted her or Stephanie (ex-girlfriend) to pick him up at 29th St. either on corner or at Basic [Construction] because of problems he was having with a girl he picked up on Washington Ave. a couple of days before . . . ." (JA 427, read into the record at JA 207.) Testifying at the federal habeas hearing, Saunders took the position that "it didn't make any sense" to follow up the leads about Hall's calls for help (JA 209) because Fleming's statement identified the prostitute who frightened Hall as a *woman*, and Hall had obviously not been killed by a woman. (*Ibid.*) The district court, in noting the discrepancy between the Thrash and Fleming entries with regard to the gender of the prostitute, described Fleming's statement as indicating "that Thrash's secondhand account of the events was less than reliable" (74 F. Supp.2d at 611) but did not explain by what reasoning Fleming's statement might be deemed the *more* reliable of the two, considering that (1) both statements were secondhand as to what Hall said *to Stephanie*; (2) Saunders made no attempt to talk to Thrash, Fleming *or* Stephanie about Hall's telephone calls for help (see JA 206, 207, 209, 225, 229, 252-253); (3) Fleming, unlike Thrash, *could not have been correct* about the date of the calls; and (4) Saunders' own notes following the Fleming entry say "(this could be just Bull / or could have day wrong" (JA 427). The



17-year-old Hall was not living at home,[24] had a Department of Social Services caseworker who was his legal custodian,[25] had been in foster care,[26] and had assaulted his mother in a manner leading her to file charges against him (though she may have decided later for some reason not to press them) were not used in Mickens' defense in any way, even after the trial judge who was reviewing the jury's death verdict received a post-verdict report containing the most affecting statements (*e.g.*, "'all I lived for was that boy,'") on the mother's part. (JA 220-221.)

Saunders was called as a witness at the district court hearing and testified that he never perceived any potential conflict of interests between his roles as counsel for Mickens and as counsel for Hall. (74 F.Supp.2d at 605-606; JA 197-198, 239-240, 241.) The district court credited this testimony (see, *e.g.*, 74 F.Supp.2d at 605-606, 612-613),[27] saying that

district court did not finally resolve the discrepancy between the two entries because, after reviewing all of Saunders' proffered justifications for failing to follow up the leads relating to the prostitute who frightened Hall, the district court found that "[t]hese reasons for refusing to pursue evidence which pointed to the existence of an alternative perpetrator are not defensible, especially where, as here, a client's life is on the line." (74 F. Supp.2d at 611.)

[24] The newspaper article described in note 19 *supra* reported that "Adults who often fed Hall describe him as homeless because he depended upon their generosity and never knew whether he was welcome at his mother's house." (JA 397.)

[25] Saunders' testimony at the habeas hearing seems to deny he knew Hall had a social worker. (JA 190-191, 235-236.) But the petitions filed against Hall in the JDRC proceeding in which Saunders represented Hall listed "City of Hampton, Va. DSS-Caseworker Wanda Rogers" as his "Guardian/Legal Custodian or Person in Loco Parentis." (JA 393, 395.)

[26] See JA 222, 231.

[27] Nevertheless, it is indisputable that Saunders had *some* level of awareness of the duplicity of his position, because he testified that he had made a joking comment to someone (he did not recall who): "'Since I

"the evidence shows that, regrettably, Saunders never struggled with the ethical issues" involved (74 F. Supp.2d at 605) in representing a capital murder defendant after having represented the murder victim on criminal delinquency charges at the time of the victim's death.[28] This "utter insensitivity to the ethical issues raised by the facts" (74 F. Supp.2d at 612) was attributed by the district court both to Saunders' belief that "his allegiance to Hall '[e]nded when I walked in the courtroom and they told me he was dead and

represent Hall, do you think they'll let me out of this case?' " (JA 233, 247.) His recollection of this comment evolved slowly. When interviewed by federal habeas counsel, Saunders said he had told the judge who appointed him in Mickens' case about his prior representation of Hall—"that I had talked to her about it and that there was no conflict." (JA 199-202.) Later he recalled that the conversation was not with the judge, may not even have been in court, and was the above-described "joke" (JA 233, 247) made to "somebody" (JA 233). (See JA 201-202, 232-233.) Saunders did not contact federal habeas counsel and advise him of this changed recollection "[b]ecause I don't know whether I had your phone number or not either. I'm not saying I didn't. I don't know whether I did or not." (JA 202.)

[28] The district court acknowledged that "Hall's criminal history might have had some relevance to Mickens' case if Mickens' testimony had not foreclosed any theory of self-defense." (74 F. Supp.2d at 606 n.15. ) But the court believed that, because Mickens testified at trial that he did not kill Hall, "any confidential information [Saunders may have obtained] from Hall . . . was [not] relevant to Mickens' defense either on the merits or at sentencing." (74 F. Supp.2d at 606.) Of course, at the time Saunders accepted an appointment to represent Mickens, Saunders had no idea what Mickens' "testimony" might be. And even in retrospect, the "testimony" to which the district court refers as making Hall's history irrelevant *was presented at a trial at which Mickens was counseled and represented by an attorney afflicted with a conflict of interests* that foreclosed the use of information unfavorable to Hall and might therefore have led Saunders to allow Mickens to take the stand and deny guilt without adequate consultation about whether Mickens would be better advised to forgo testifying and develop theories of defense or mitigation involving consensual sodomy, assaultive behavior, sexual mockery, or other forms of discreditable activity by Hall contributing to his death.



the case was gone'" (74 F.Supp.2d at 605)[29] and to "Saunders' conclusion that he did not obtain any confidential information from Hall . . . and that '[n]othing I knew or did or had anything to do with Mr. Hall had anything to do with [Mickens'] case'" (74 F.Supp.2d at 606). The district court characterized the first of these beliefs as "remarkably wrong" (74 F.Supp.2d at 605) and, as to the second, it found "inconceivable that Saunders obtained no confidential information from Hall." (74 F.Supp.2d at 606.) But it nevertheless was persuaded that whatever confidential information Saunders may have learned from Hall was not "relevant to Mickens' defense either on the merits or at sentencing." (74 F.Supp.2d at 605.)[30]

The district court conceded that "[w]hen Saunders was appointed to represent Mickens in the capital murder of Hall, Saunders was obligated to consider the ethical problems posed by the appointment because Saunders' duty to zealously represent Mickens might be compromised by his loyalty to Hall, including his obligation to preserve Hall's secrets and confidences." (74 F.Supp.2d at 605.) The district court found as a fact that Saunders had never considered these ethical problems (74 F.Supp.2d at 605) or disclosed the fact of his prior representation of Hall to Mickens or the trial court or even to Saunders' co-counsel so that *they* could consider the problems. (74 F.Supp.2d at 600, 606, 612 & n.20.) Yet the district court concluded that Saunders' dual role in relation to Hall and Mickens neither constituted an "actual conflict of interest" (74 F.Supp.2d at 604-606) nor had an "adverse effect" on his representation of Mickens (74 F.

[29] See also 74 F. Supp.2d at 606: "Without condoning the inexcusable failure to disclose the previous representation of Hall, the Court finds that, as a factual matter, Saunders *did not believe* that any 'continuing duties to [a] former client[ ] [might] interfere with his consideration of all facts and options for his current client.'" (Emphasis added.)

[30] See note 28 *supra*.

Supp.2d at 606-613). These conclusions were derived from an analysis that accepted as a *given* the record made by Saunders at Mickens' trial, including Mickens' testimonial disavowal of any connection with Hall's death. Such a disavowal, the district judge believed, made irrelevant the ethical constraints that restricted Saunders' ability to develop and present evidence disparaging to Hall.[31] Mickens' federal habeas petition was accordingly denied.

A divided three-judge panel of the Fourth Circuit reversed this decision on the grounds that Mickens

> "has shown that (1) the state judge failed to inquire into an apparent conflict that she knew or reasonably should have known existed, (2) he did not waive any conflict, and (3) his lawyer, Saunders, had an actual conflict of interest. This is sufficient under *Wood v. Georgia* [450 U.S. 261 (1981)] to establish the merits of his claim."

(227 F.3d at 217.) The panel majority identified at least three distinct aspects of Saunders' situation which amounted to an actual conflict:

> (1) "Saunders' interest (or duty) in maintaining Hall's secrets and confidences diverged from Mickens' interest in pursuing . . . a reasonable pretrial investigation." (227 F.3d at 216.) "Saunders did not investigate (or attempt to develop) any negative information about Hall, the victim of the crime Mickens allegedly committed. Yet the circumstances of this crime (murder and sodomy) suggested that some consideration had to be given to investigating the character and background of the victim." (*Ibid.*) "Saunders had an actual conflict because he could not even consider an investigation into Hall's character or background, using as a starting point the information he had about the circumstances of the crimes charged against Hall." (*Id.* at 217.)

[31] See note 28 *supra*.



> (2) "Because this was a capital case, there was a good chance that someone from the victim's family (perhaps Hall's mother) would testify during the penalty phase. . . . Surely this would require defense counsel to consider investigating the victim's relationship with key family members, especially (in this case) the victim's mother since the victim was a juvenile. . . . Saunders' interest in preserving Hall's confidences diverged from Mickens' interest in having Saunders consider an investigation into Hall's relationship with his mother." (*Ibid.*)
>
> (3) "[T]he Virginia Code of Professional Responsibility . . . provided that a lawyer had the duty to 'explain any circumstances that might cause a client to question his undivided loyalty.' . . . As the district court found, 'Saunders' representation of the murder victim, at the time of the murder, is undoubtedly a circumstance "that might cause a client to question his undivided loyal."' . . . Saunders thus had the duty to inform both Mickens and the court of the prior representation of Hall. If Mickens had objected, Saunders had a related duty to withdraw. ¶ Once Saunders proceeded with the representation of Mickens in these circumstances, he was potentially subject to disciplinary proceedings. . . . Saunders had an interest in preventing his representation of Hall from coming to light. This interest diverged from Mickens' interest in learning about the earlier representation and in making sure he . . . received conflict-free representation." (*Id.* at 214-215.)

A dissenting opinion argued that, while "the decision in *Wood* . . . has not turned out to be a model of clarity" (227 F.3d at 220), *Wood* is best read as requiring a showing of *both* an actual conflict of interests *and* a resulting adverse effect on counsel's performance; and that Mickens had not shown the requisite adverse effect. (227 F.3d at 218-224.)

The Commonwealth's petition for rehearing *en banc* was granted and the Fourth Circuit essentially adopted the position of the panel dissent in rejecting Mickens' Sixth Amendment claim by a vote of seven to three. After acknowledging that the claim was properly before the *en banc* court on the merits,[32] the majority made two assumptions which framed its analysis of the Sixth Amendment issues presented. It "accept[ed] for purposes of discussion, without deciding the issue, that Judge Foster, who appointed Saunders to represent Mickens, reasonably should have known that Saunders labored under a potential conflict of interest arising from his previous representation of Hall." (240 F.3d at 357.) And it assumed *arguendo*, again without need to "reach [Mickens'] . . . argument [on the point decided in his favor by the panel] that he has established an actual conflict of interest." (240 F.3d at 360.)

In this state of the case, the *en banc* majority saw the doctrinal issue presented as involving the appropriate interpretation of *Wood v. Georgia* in the light of the earlier opinion in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), which was quoted and paraphrased three years after *Wood* in *Strickland v. Washington*, 466 U.S. 668 (1984):

> "Mickens notes that the *Wood* Court remanded to the trial court [which had failed to inquire into a potential conflict of interests of counsel apparent on the record] 'to determine whether the conflict of interest that this record strongly suggests actually existed' with an instruction to award a new hearing if 'an actual conflict

[32] The *en banc* court agreed with the panel majority and with the district court that Mickens' failure to raise the claim in state court did not bar federal habeas adjudication on the merits under the doctrines of exhaustion or procedural default because the basis for the claim was first discovered by Mickens' federal habeas counsel and could not have been discovered earlier by lawyers for Mickens other than Saunders himself. (240 F.3d at 356-357.)



> existed . . .' but did not expressly require the trial court to identify an adverse effect. . . . Mickens concludes from this remand instruction that the *Wood* court eliminated the adverse effect requirement [laid down by *Sullivan*—a case in which the potential conflict of interests was *not* apparent on the record] in cases where the trial court failed to inquire into a conflict of interest about which it reasonably should have known."

(240 F.3d at 359.) The *en banc* court rejected this conclusion and held that "*Wood* does not relieve a petitioner [who is "challenging his conviction on conflict of interest grounds"] of [the] . . . burden [imposed by *Sullivan* to "establish that his attorney's conflict of interest adversely affected his performance"], even when the trial court has failed to inquire into a potential conflict about which it reasonably should have been aware." (240 F.3d at 363.)

Elaborating the adverse-effect requirement, the *en banc* majority endorsed a "three-part standard." (240 F.3d at 361.) In addition to "identify[ing] a plausible alternative defense strategy that his [conflict-ridden] . . . counsel might have pursued" and showing that "the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time," a Sixth Amendment claimant must also show that "defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict." (*Ibid.*) The requisite "link" was held missing whenever the district court found as a matter of subjective fact that Saunders' reasons for various failures were "unrelated" to Saunders' conflict of interests[33] or where Saunders' course of action

[33] See, *e.g.*, 240 F.3d at 362: "The district court . . . concluded that Saunders' failure to investigate into matters identified by Mickens was either harmless or unrelated to Saunders' conflict of interest. . . . In particular, the district court attributed Saunders' failure to inquire into leads as to possible alternative perpetrators of the murder to the weak nature of the leads, rather than to Saunders' conflict of interest. . . ."

was one that a competent, unconflicted lawyer might have chosen.[34] [35] "Because . . . [it] agree[d] with the district court that many of Mickens' assertions of adverse effect were not viable defense strategies[36] and that any viable defense

[34] See, *e.g.*, 240 F.3d at 361: "Because Saunders was entitled to rely on the information provided by his client, consensual sodomy was not a viable defense strategy at the time Saunders made his decision not to pursue it. See *Royal v. Taylor*, 188 F.3d 239, 248-49 (4th Cir. 1999) [a case *not* involving any conflict of interests but dealing with what counsel is "entitled to" do in the context of a claim that *un*conflicted counsel was ineffective]; *Roach v. Martin*, 757 F.2d 1463, 1476-80 (4th Cir. 1985) [a case involving wholly independent claims of conflict of interests and ineffective assistance under *Strickland* in which the passages about counsel's being entitled to rely on a client's statements are found solely in the portion of the opinion discussing the *Strickland* claim]." See also *id.* at 362: "Choosing not to vilify the mother of the victim cannot be *the mark of incompetent counsel* by any measure" (emphasis added).

[35] We use the disjunctive "or" because it is plain that the *en banc* majority held the requisite "link" unestablished even when Saunders' failings were below the standard of professionally competent behavior, so long as they were not subjectively motivated by his perception of conflicting obligations to Mickens and Hall. For example, as quoted in note 33 *supra*, the *en banc* majority approved the district court's conclusions "that Saunders' failure to investigate into [various] matters . . . was either harmless or unrelated to Saunders' conflict of interest." In connection with one of those investigative failures, the district court wrote: "The lead should have been pursued because . . . [it] suggested that there might have been evidence of an alternative perpetrator. The record discloses no reason for the failure to follow that lead *other than Saunders' lack of perspicacity or perhaps indolence*. Neither of these reasons bespeaks that he failed to act because of his previous representation of Hall." (74 F. Supp.2d at 610 [emphasis added].)

[36] Like the district court (see note 28 *supra*), the *en banc* Court of Appeals majority evaluated the "viability" of alternative strategies against the record *as it was made by conflicted counsel himself* and without regard to what sort of record might have been made by conflict-free counsel for Mickens. See, *e.g.*, 240 F.3d at 361 : "[P]resentation of . . . evidence [obtained by following up rumors that Hall was a male prostitute] would have been counter-productive and would have been inconsistent with Mickens' assertions of sympathy for the victim and his family. Mickens



strategies were not linked to his attorney's conflict of interest, . . . [the *en banc* majority] reject[ed] Mickens' Sixth Amendment challenge to his conviction" (420 F.3d at 362) and denied habeas corpus relief.

## SUMMARY OF ARGUMENT

*I.A* This Court's precedents lay down an unambiguous rule to govern cases in which a judge is on notice of a potential conflict of interests on the part of a criminal defendant's lawyer before trial but fails to inquire into it. If the defendant is convicted before learning about the situation, he or she is entitled to postconviction relief upon a showing that the lawyer did in fact harbor an actual conflict of interests. No showing of "adverse effect" is required.

The rationale for this rule was established by *Holloway v. Arkansas*. The rule itself was explicitly acknowledged in *Cuyler v. Sullivan*. The rule was reiterated as the *ratio decidendi* for the Court's square holding in *Wood v. Georgia*. The rule is settled and it is clear. It is obedient to basic Sixth Amendment principles and it is efficient. There is no reason to depart from it. The Court should apply it here.

*I.B* Mickens' lawyer, Bryan Saunders, harbored an acute, actual conflict of interests in purporting to represent Mickens. Mickens was accused of the capital murder of Timothy Hall.

v. Greene, 74 F. Supp.2d at 608." The cited passage from the district court opinion (at 608) reads: "Of course, adoption of that alternative strategy [of investigating negative information about Hall] would have been inconsistent with Mickens' profession of innocence and his purported regret at Hall's passing. 'I'll pray each and every day that [Hall] may rest in peace.' (6/4/93 Hr. T. at 1090 (sentencing hearing)). Saunders carried that standard during his closing argument, emphasizing the sanctity of human life and expressing regret for Hall's death. (2/7/96 Hr. T. at 479-80; 1/13/99 Hr. T. at 157.) Saunders eschewed an attack on Hall, the young victim of a horrible crime, because it would have appeared disingenuous and would have diminished the value of Mickens' life in the eyes of the jury."

At the time of Hall's death, Hall was represented on criminal delinquency charges by Bryan Saunders. In the course of representing Hall, Saunders obtained contemporary, confidential information concerning Hall's background and circumstances that any unconflicted lawyer for Mickens would have investigated for its bearing on issues of guilt and penalty in Mickens' case. An unconflicted lawyer would have made the decisions how and how much to pursue and use this information based solely upon Mickens' interest in defending a prosecution for his life. Saunders, with his obligations to his former client, Hall, was ethically forbidden to make these investigative and strategic decisions solely in Mickens' interest. That was and is an actual conflict.

*II.* Even if *Wood* countenanced an inquiry into "adverse effect" under these circumstances, the Fourth Circuit *en banc* majority misconceived and misapplied the adverse-effect concept. A showing of adverse effect needs not depend upon a subjective inquiry into the conflict-ridden lawyer's reasons for refraining from actions that would be in his client's interest. Still less does it require that the lawyer's conduct of the client's case be such that no unconflicted, competent lawyer would have chosen to proceed in the same manner.

The touchstone of "adverse effect" is impairment of the adequacy of a client's legal representation due to a conflict of interests. Representation includes the responsibility to make choices about how to proceed based upon undivided loyalty to one's client. Saunders was prohibited from making such choices based solely upon Mickens' interest. That prohibition critically impaired the adequacy of Mickens' representation.



## ARGUMENT

### I. *WOOD V. GEORGIA* GOVERNS THIS CASE AND REQUIRES POSTCONVICTION RELIEF BECAUSE OF DEFENSE COUNSEL'S ACTUAL CONFLICT OF INTERESTS, WHETHER OR NOT THE CONFLICT IS SHOWN TO HAVE HAD ANY "ADVERSE EFFECT"

Although the facts of this case are complicated and bizarre, the basic Sixth Amendment issue is simple: When a judge appointing counsel for a criminal defendant should be aware of a potential conflict of interests burdening the lawyer s/he selects, and when s/he nonetheless fails to inquire whether the conflict is an actual one and is acceptable to the defendant (if waivable), must the defendant who learns and proves after conviction that the lawyer **did** have an actual conflict of interests ***also*** show some specific "adverse effect" of the conflict in order to obtain postconviction relief?

The *en banc* majority below was wrong in concluding that this Court's cases speak incoherently or inconsistently to that issue. The explicit holding of *Wood v. Georgia*, 450 U.S. 261 (1981), is that a defendant in this posture is entitled to a new trial upon the showing of an actual conflict of interests without more. Far from being at odds with any other precedent, the ruling in *Wood* aligns with all of the conflict-of-interest decisions and right-to-counsel pronouncements of this Court to form a harmonious whole. The whole set of rules is sensible, practical, and responsive to core Sixth Amendment values. Under those rules, Mickens is entitled to a new trial with conflict-free counsel to defend him.

### A. Under *Wood*, an actual conflict of interests that inheres in counsel's duplicitous posture deprives a criminal defendant of the assistance of counsel and voids the defendant's conviction with no need to show "adverse effect"

A defendant's right to counsel is fundamental to the adversary system of criminal justice. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

> "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." (*Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938).)

To assure just results and command public confidence in the adversary process "now considered fundamental to the fair administration of American justice," [37] a criminal defendant must have "the guiding hand of counsel at every step in the proceedings against him," *Powell v. Alabama*, 287 U.S. 45, 69 (1932)—in conducting the investigation necessary for a fair trial,[38] in attempting to persuade the prosecutor to resolve the prosecution without trial,[39] in subjecting the prosecution's case to "the crucible of meaningful adversarial testing," [40] in determining whether the defendant should take the stand in his or her own defense,[41] in preparing and

[37] *Faretta v. California*, 422 U.S. 806, 818 (1975).

[38] *Kimmelman v. Morrison*, 477 U.S. 365, 384-385 (1986).

[39] *Holloway v. Arkansas*, 435 U.S. 475, 490-491 (1978).

[40] *United States v. Cronic*, 466 U.S. 648, 656 (1984).

[41] *Brooks v. Tennessee*, 406 U.S. 605, 612-613 (1972).



presenting the defendant's testimony if s/he does,[42] in evaluating and presenting other defensive evidence,[43] and in arguing to the trier of fact that the prosecution's case is not all that it appears to be or that there is another side to the case warranting a reasonable doubt.[44] These are the indispensable components of effective advocacy, and "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

The Court first considered the constitutional implications of a conflict of interests on the part of defense counsel in *Glasser v. United States*, 315 U.S. 60 (1942). *Glasser* held that "the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests." (*Id.* at 70.) Finding that Glasser's lawyer had a conflict of interests, "the Court declined to inquire whether the prejudice flowing from it was harmless and instead ordered Glasser's conviction reversed." [45]

The Court revisited the subject of a conflict-ridden defendant's lawyer in *Holloway v. Arkansas*, 435 U.S. 475 (1978). The rule of *Holloway* is that when appointed counsel has advised the appointing court "of the probable risk of a conflict of interests," and when "the judge [has] then failed either to appoint [other] . . . counsel or to take adequate steps to ascertain whether the risk was too remote to warrant [other] . . . counsel," this failure "deprive[s the defendant] . . .

[42] *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Geders v. United States*, 425 U.S. 80 (1976).

[43] *[Terry] Williams v. Taylor*, 529 U.S. 362 (2000).

[44] *Herring v. New York*, 422 U.S. 853 (1975).

[45] *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978). See 315 U.S. at 75-76.

of the guarantee of 'assistance of counsel' " (*id.* at 484), and entitles the defendant to a new trial with no need "to show that a conflict of interests—which he and his counsel tried to avoid by timely objections to the joint representation—prejudiced him in some specific fashion" (*id.* at 490).

It is plain from *Holloway*, though the *en banc* majority below failed to see it, that the significance of the objections made by Holloway's lawyer to representing multiple defendants was not primarily that they placed the defendants' protests on the record, but that they **called the existence of a conflict of interests to the attention of the court**. *Holloway* quotes *Glasser* as holding that " '[u]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused' " and to refrain from putting counsel in the position of representing interests which might diverge from a client's " '*when the possibility of that divergence is brought home to the court.*' " (435 U.S. at 484-485.) Then *Holloway* says that "[t]his reasoning [from *Glasser*] has direct applicability in [the *Holloway*] . . . case where the 'possibility of . . . inconsistent interests' was 'brought home to the court' by formal objections, motions, and defense counsel's representations." (435 U.S. at 485.) Manifestly, it was the "bringing home to the court," not the mechanism through which it occurred, that was decisive in *Holloway*. (See *Wheat v. United States*, 486 U.S. 153, 160, 161 (1988), reading *Holloway* this way.)

The Court's next treatment of the subject came in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). The question in *Sullivan* was whether a trial judge is obligated to inquire *sua sponte* into the existence of a conflict of interests whenever a single lawyer appears on behalf of two or more criminal defendants in a multi-defendant prosecution. *Sullivan*'s unsurprising answer was, no. In an opinion by Justice Powell, the Court acknowledged that a potential for conflict exists in all joint-representation cases (*id.* at 348), but it recognized that there may be no actual conflict in many of the cases and that



sometimes multiple representation best serves the interests of all defendants because " ' "[a] common defense . . . gives strength against a common attack" ' " (*ibid.*). The Court's reasoning was once again quite clear, and it was consistent with *Holloway* on every point, including the question of what is constitutionally required to trigger a judicial obligation to inquire into a potential conflict of interests:

> "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises in the course of a trial. Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. Indeed, as the Court noted in *Holloway* . . . , trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel. . . . **Unless the trial court knows or reasonably should know that a particular conflict exists**, the court need not initiate an inquiry." (446 U.S. at 346-347 [emphasis added].)

The *Sullivan* Court went on to hold that *where no judicial duty to initiate an inquiry arises*, a defendant challenging his or her conviction on Sixth Amendment conflict-of-interest grounds must show both an "actual conflict of interest" (*id.* at 348, 349-350) and that this conflict "adversely affected his lawyer's performance" (*id.* at 348).

Less than a year after *Sullivan*, the Court handed down its decision in *Wood v. Georgia*, 450 U.S. 261 (1981), also written by Justice Powell. The premise of *Wood* was that "[w]here a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." (*Id.* at 271.) Finding that the *Wood* record showed "that the *possibility* of a conflict of interest was sufficiently apparent at the time of the [criminal proceeding] . . . to impose upon the court a duty to inquire further" (*id.* at 272), the Court

remanded for such an inquiry. It reiterated *Sullivan*'s Unless clause in mandatory form ("*Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists' " [*id.* at 272 n.18]) and instructed the trial court on remand to "hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed . . . ." (450 U.S. at 273.) The dispositional paragraph in *Wood* could not be clearer regarding either the issue to be determined at the hearing or the consequences of its resolution: "If the court finds that an actual conflict existed . . . and that there was no valid waiver of the right to independent counsel, it must hold a new . . . [trial] that is untainted by a legal representative serving conflicting interests." (*Id.* at 273-274.)

Thus, in *Sullivan* in 1980 the Court explicitly laid down a two-part inquiry to be undertaken in cases where a potential conflict of interests exists but the judge neither knows nor has reason to know about it. Describing the rule of *Sullivan* in 1984, the Court in *Strickland v. Washington*, 466 U.S. 668, again explicitly articulated the same two-part inquiry, writing that a defendant seeking Sixth Amendment relief under *Sullivan* must demonstrate "that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " (466 U.S. at 692 [quoting *Sullivan*, 446 U.S. at 348]). And in 1981, in between this pair of two-part pronouncements, the Court in *Wood*—when delineating the findings that would call for a new trial in one of the "special circumstances" contemplated by *Sullivan* (446 U.S. at 346-347), namely, where "the trial court knows or should reasonably know that a particular conflict exists" but fails to inquire into it (446 U.S. at 347)—wrote equally explicitly that under these circumstances only **one** determination needed to be made in order to compel a new trial: "that an actual conflict existed" (450 U.S. at 273).



In the light of this series of decisions, it will hardly do to dismiss *Wood*'s single-issue remand instruction to the trial court as "amount[ing] to no more than shorthand for an explicit two-part test that the *Wood* Court did not even have the occasion to quote [from *Sullivan*]" (240 F.3d at 360). In the first place, what the *Wood* Court *did* quote from *Sullivan* was *Sullivan*'s express language anticipating and distinguishing the factual situation presented in *Wood*. This language says in no uncertain terms that there are two different rules for two different situations—the *Wood* situation where a judge " 'knows or reasonably should know that a particular conflict exists' " (*Sullivan*, 446 U.S. at 347, quoted in *Wood*, 450 U.S. at 272 n.18), and the *Sullivan* situation where the judge does not. But if *Wood*'s holding that a showing of "actual conflict" suffices to obtain a new trial is conflated with *Sullivan*'s actual-conflict-*plus*-adverse-effect requirement, then there are **not** two different rules; and *Sullivan* as well as *Wood* is rendered gibberish.

In the second place, the *Sullivan* and *Wood* opinions, containing manifestly different formulations of what must be shown to obtain a new trial, were both written by Justice Powell, a studiously careful and precise author. The passage of his *Wood* opinion which the Fourth Circuit parsed as "shorthand" is *the dispositional paragraph*, setting out what the trial court was to do on remand. That is a peculiarly unlikely place for a careful jurist to write inexactly.

And in the third place, the suggestion by the *en banc* Fourth Circuit that the explicit language of *Wood* should be disregarded so that *Wood* will not "have overruled by implication the second part of Sullivan's two-part standard" (240 F.3d at 359) is untenable. *Wood* **followed** *Sullivan*, rather than "overruling" it, in distinguishing cases where a judge "'knows or reasonably should know that a particular conflict exists'" and those where s/he does not. To obliterate that distinction is to disrespect *Sullivan* **and** overrule *Wood*.

*Stare decisis* should not be abandoned so cavalierly. *Dickerson v. United States*, 530 U.S. 428 (2000). There is no "'"special justification"' " (*id.* at 443) for departing from *Wood*. To the contrary, there is every reason to adhere to *Wood*'s square holding.

**One**. *Wood*, *Sullivan*, *Holloway* and the description of these cases in *Strickland* form a coherent body of Sixth Amendment doctrine. As the Fourth Circuit dissenters correctly observed, the cases lay down rules for

> "three separate circumstances in which conflict of interest claims arise under the Sixth Amendment. The first is when a defendant objects to his representation on the basis of a conflict and the trial judge fails to inquire into the merits of the objection. In this situation, the defendant is entitled to automatic reversal and a new trial. *See Holloway*, 435 U.S. at 488-89 . . . . The second circumstance is when there is no objection to the representation, but the judge knew or reasonably should have known about an apparent conflict. If the judge fails to inquire in this situation, the defendant is only required to show that his lawyer labored under an actual conflict. *See Wood*, 450 U.S. at 273-74 . . . . The third circumstance is when there is no objection, and the conflict is not apparent to the judge. In that case, the defendant must show that his lawyer labored under an actual conflict and that the conflict adversely affected his lawyer's performance. *See Sullivan*, 446 U.S. at 348 . . . ." (240 F.3d at 366.)

This set of rules makes perfect logical sense. With respect to (A) requiring a judicial inquiry into potential conflicts that should be apparent to a reasonable judge, and (B) granting the defendant a new trial upon a showing of actual conflict if the inquiry is not made, they prescribe the same rule in *Holloway* situations (where the problem is called to the court's attention by a defense objection) and in *Wood* situations (where the



problem is called to the court's attention by other circumstances of record). Each of these results is apt, because there is no conceivable reason to treat the *Holloway* and *Wood* situations differently for purposes of issues (A) or (B). In both situations, the judge is on notice of a significant risk that the defendant may be denied the "assistance of counsel" required by the Sixth Amendment; and in both situations the judge is equally well positioned to dispel that risk by a simple inquiry and straightforward follow-up.

The failure of an apparently conflicted lawyer to protest the conflict in the *Wood* situation does not lessen the need for judicial inquiry; nor does it supply any justification for requiring a *post hoc* showing of some specific adverse effect if the inquiry is not made and an actual conflict emerges. As *Sullivan* noted, defense attorneys are ethically obliged to bring potential, unwaived conflicts to the attention of the court. (446 U.S. at 346.) When they do so, a trial judge can and should be expected to "rely . . . upon the good faith and good judgment of defense counsel" because counsel " ' "is in the best position . . . to determine when a conflict of interest exists or will probably develop . . . ." ' " (*Sullivan*, 446 U.S. at 347, quoting *Holloway*, 435 U.S. at 485, quoting *State v. Davis*, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973).) This is why a *potential* conflict suffices to secure postconviction relief in *Holloway* situations (where a judge has failed to act in response to defense counsel's representation that, in his or her professional judgment, s/he is burdened by a conflict of interests),[46] while a showing of an *actual* conflict is required

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[46] "[S]ince the decision in *Glasser*, most courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted. . . . [A]ttorneys are officers of the court, and " 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.' " . . . We find these considerations persuasive." (*Holloway*, 435 U.S. at 485-486.)

in *Wood* situations (where counsel makes no such representation). But if an apparently conflicted lawyer—a lawyer about whom the "court knows or should know that a particular conflict exists" (*Sullivan*, 446 U.S. at 347)—does **not** broach the subject of that conflict to the court, the court can **not** safely rely on counsel's good faith and good judgment. After all, the danger of conflicting interests is precisely that a lawyer with a conflict may be faithless.[47] This danger is in no way dispelled through silence on the subject by a lawyer whom the court has reason to believe is harboring—and concealing—a conflict.

**Two**. The *Wood-Sullivan-Holloway* rules also make eminent practical sense. They do not compel a judicial inquiry every time an attorney appears on behalf of two jointly-charged defendants. As a corollary—to avoid jeopardizing the results of all trials involving multi-defendant representation—they require defendants who make post-conviction conflict-of-interest claims in this situation to show both an actual conflict and an adverse effect of the conflict.

But the rules do compel a judicial inquiry when facts known to the judge put the court on notice that a particular conflict exists. This inquiry serves to nip the problem in the bud and to avert not only the risk that a faithless lawyer may expose the defendant to an unfair trial, but also the heavy costs and hazards of postconviction litigation attempting to reconstruct after-the-fact the extent to which the conflict affected the lawyer's performance. The costs are obvious.

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[47] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, Chapter 8, Introductory Note (American Law Institute 2000) ("The prohibition against conflicts of interest reflects the role of a lawyer as the loyal representative of a client's interest. . . . Lawyers are required to avoid divided loyalties that would harm their principals, their clients."); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 586 (1990) (Justice Kennedy, dissenting) ("[T]he lawyer's duty of loyalty long has precluded the representation of conflicting interests.")



***Everybody*** in two court systems would have been spared enormous wastes of time and effort if Judge Foster had simply said to attorney Saunders in 1992: "Before I appoint you to represent Mr. Mickens on capital murder charges, let's explore the possible conflict of interests resulting from your representation of the murder victim until 3 days ago."

As for the *hazards* of postconviction litigation, the present record bears out this Court's observation in *Holloway* that *post hoc* assessment of "the impact of a conflict on the attorney's representation of a client" comes down to "unguided speculation" (435 U.S. at 491). It also bears out the observation of two courts of appeals that the quest for *post hoc* truth in such assessments is likely to prove a futile effort to pin down a scared, self-protective, slippery lawyer, anxious to escape ethical censure at whatever cost to a former client.[48] In this case, the district judge credited some aspects of attorney Saunders' testimony,[49] found other aspects incredible,[50] left unresolved irreconcilable conflicts between

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[48] *United States v. Malpiedi*, 62 F.3d 465, 470 (2d Cir.1995): "[A]fter-the-fact testimony by a lawyer who was precluded by a conflict of interest from pursuing a strategy or tactic is not helpful. Even the most candid persons may be able to convince themselves that they actually would not have used that strategy or tactic anyway, when the alternative is a confession of ineffective assistance resulting from ethical limitations." *Accord*: *Perillo v. Johnson*, 205 F.3d 775, 807 (5th Cir. 2000).

[49] See 74 F. Supp.2d at 605-606, 612-613, discussed in text at note 27 *supra*.

[50] See Saunders' testimony at page 219 of the transcript of the federal district court hearing held 1/13/99:

"BY MR. HARRIS:

"Q. . . . [D]id you receive any confidential communications from Timothy Hall in the course of your representation of Timothy Hall?

"A. Not really, no." (JA 237.)

Saunders' testimony and that of co-counsel Keeling,[51] and did not say what he thought of behavior on Saunders' part calculated to turn the postconviction proceedings into a game of Blind Man's Buff with federal habeas counsel.[52] Any doubts about the wisdom of the *Wood-Holloway* rule eschewing *post hoc* inquiries into adverse effect once a lawyer has been shown to have tried a case through to conviction while laboring under an actual conflict of interests can be settled, we respectfully submit, simply by reading the transcript of the federal habeas hearing below from start to finish. Insofar as it attempted to untangle Bryan Saunders' motives or make sense of his performance in conducting Walter Mickens' case, that hearing is a model of the kind of litigation that constitutional rules should be shaped to avoid.

**Three**. The *Wood-Holloway* rule eschewing *post hoc* inquiry into "adverse effect" conforms to this Court's understanding of the evil that drives the substantive Sixth Amendment proscription of conflict-ridden counsel. "[T]he evil . . . is in what the advocate finds himself compelled to *refrain* from doing." (*Holloway*, 435 U.S. at 490; *accord*: *United States v. Cronic*, 466 U.S. at 661 n.28.) A record made by a lawyer who harbors a conflict of interests is likely to be an *impoverished* record, and the extent of the impoverishment is undetectable. To use such a record as the basis for calculating adverse effect is like trying to measure the depletion in a cracked radiator tank by pouring quarts of coolant into it and keeping careful count.

**Finally**, the *Wood-Holloway* rule is squarely in the grain of this Court's general Sixth Amendment jurisprudence. Since

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Compare the court's finding: "it is inconceivable that Saunders obtained no confidential information from Hall, ([citing] 1/13/99 Hr. Tr. at 219)." (74 F. Supp.2d at 606.)

[51] See, *e.g.*, notes 6, 19, 21 *supra*.

[52] See note 27 *supra*.



*Powell v. Alabama* first spoke of the "guiding hand of counsel," the Court has reiterated time and again that what is needed and expected from a lawyer for the defense is the exercise of *trained professional judgment* to assist the accused in navigating the shoals of the criminal process.[53] Unless that judgment is exercised with undivided loyalty to the defendant, it cannot be counted on to provide the "assistance of counsel" that the Constitution guarantees.[54] Therefore, when a defendant—at the first opportunity after learning there is cause to doubt the undivided loyalty of defense counsel—proves that counsel harbored an **actual conflict of interests** involving obligations or loyalties which are inherently at odds with some plausible course of action not pursued on the client's behalf, it is neither necessary nor proper to engage in computations of adverse effect. A failure of the judicial process has left this defendant at the mercy of a lawyer who could not be trusted;[55] and that should be sufficient to call for a new trial.

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[53] See, *e.g.*, *Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972); *Geders v. United States*, 425 U.S. 80, 88-89 (1976).

[54] See, *e.g.*, AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-14 (1983) ("Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client."); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING, § 1.7:101 (2d ed. 1998) ("The basic duties that a lawyer owes to a client—competence, confidentiality, communication, and loyalty—are all implicated in conflict of interest situations.")

[55] CHARLES WOLFRAM, MODERN LEGAL ETHICS § 7.1 at 316-317 (1986) ("The principle of loyalty of lawyer to client is a basic tenet of the Anglo-American conception of the lawyer-client relationship. . . . Where choices have to be made between the interest of a client and any other person—whether the lawyer personally or another client, the lawyer must be in such a position that all options that might favor the client can be considered free from the likely impairment of any interest other than those

"This is not a test that requires a defendant to show that the alternative strategy or tactic not adopted by a conflicted counsel was reasonable, that the lapse in representation affected the outcome of the trial, or even that, but for the conflict, counsel's conduct of the trial would have been different. Rather, it is enough to show that a conflict existed that 'was inherently in conflict with' a plausible line of defense or attack on the prosecution's case. . . .

"The test is a strict one because a defendant has a right to an attorney who can make strategic and tactical choices free from any conflict of interest. An attorney who is prevented from pursuing a strategy or tactic because of the canons of ethics is hardly an objective judge of whether that strategy or tactic is sound trial practice. Counsel's inability to make such a conflict-free decision is itself a lapse in representation." *United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir.1995).

This is the substance of *Wood*'s wisdom; and the Court should not now abandon it.

### B. Mickens' appointed counsel harbored a severe, actual conflict of interests

The same considerations that make an inquiry into "adverse effect" improvident in *Wood* situations call for an objective test of "actual conflict." A client who has been deprived of an attorney capable of serving with unalloyed fidelity does not have to show the subjective reasons for the

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of the client."); AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Comment [1] to Rule 1.7 (1999) ("Loyalty is an essential element in the lawyer's relationship to a client."); GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 117 (1854) ("[T]he great duty which the counsel owes to his client, is an immovable fidelity.")



conflict-ridden lawyer's failures to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." [56] To demonstrate an actual conflict it is enough to establish that the lawyer "actively represented conflicting interests" (*Sullivan*, 446 U.S. at 350) in the sense of having duties or commitments inconsistent with a course of action that the lawyer might have taken in the client's interest but did not. This is implicit in *Sullivan*'s equation of "an actual conflict of interest" with "an actual lapse in representation" (*id.* at 349).

Circuit cases following *Sullivan* have uniformly recognized that such a lapse may be shown objectively, by pointing to "some plausible alternative defense strategy or tactic [that] might have been pursued [but was not, and] . . . was inherently in conflict with . . . the attorney's other loyalties or interests." [57] Using this approach, the Fourth Circuit panel

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[56] AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Comment [1] to Rule 1.3 (1999). See also AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-1 (1983): "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law."

[57] *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985). The full passage from *Fahey* reads: "In order to establish an actual conflict the petitioner must show two elements. First, he must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests."

*Fahey*'s formulation is the one most widely used in the Circuits (see, *e.g.*, *United States v. Soldevila-Lopez*, 17 F.3d 480, 486 (1st Cir. 1994); *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993); *Lopez v. Scully*, 58 F.3d 38, 41 (2d Cir. 1995); *United States v. Morelli*, 169 F.3d 798, 810 (3d Cir. 1999); *Hess v. Mazurkiewicz*, 135 F.3d 905, 910 (3d Cir. 1998); *cf. United States v. Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990) [a "seemingly valid or genuine alternative strategy or tactic was available

below identified three distinct ways in which Saunders' duties and interests flowing from his representation of Timothy Hall at the time of Hall's death were inherently in conflict with potentially productive actions that Saunders might have taken in defending Mickens but did not take. (See pages 16-17 above.) The *en banc* majority accepted the panel's conclusion on this issue *arguendo*, and for good reason. The panel's finding that Saunders labored under a severe actual conflict of interests was indisputably correct.

We submit the panel's analysis of this issue as definitive. See 227 F.2d at 213-217, JA 332-341. The following pages only emphasize a few of its less salient points:

At the very time when Timothy Hall was killed—a time at which Hall's behavior vis-à-vis his killer was decisive of the question whether the killing was capital murder [58]—Bryan Saunders represented Hall on pending charges of criminal delinquency. Within the preceding few days, Saunders had

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to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests"]) but there are other objective tests as well (see, *e.g.*, *United States v. Migliaccio*, 34 F.3d 1517, 1526 (10th Cir. 1994); *Church v. Sullivan*, 942 F.2d 1501, 1512 (10th Cir. 1991); *Stoia v. United States*, 22 F.3d 766, 771 (7th Cir. 1994); *Lipson v. United States*, 233 F.3d 942, 946 (7th Cir. 200); *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992); *Mannhalt v. Reed*, 847 F.2d 576, 581-583 (9th Cir. 1988)). Most of these opinions also recognize that when an "adverse effect" must be shown under *Sullivan*, this too can be established objectively, without proving a *motivational* link between counsel's conflicting interests and failure to pursue a course of conduct potentially beneficial to the client. On the latter point, the Fourth Circuit decision below and *Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999) (*en banc*), depart from the majority view. But *Freund* does not treat counsel's motivation as controlling on the actual-conflict issue (as distinguished from the adverse-effect issue) (see 165 F.3d at 858-860, 862-866); and the Fourth Circuit *en banc* majority ruled against Mr. Mickens solely on the adverse-effect issue, assuming *arguendo* that he had established an actual conflict of interests (240 F.3d at 356, 360).

[58] See text and notes at notes 1-2 *supra*.



met with Hall to interview him about these charges. As the district court found, it is inconceivable that Saunders obtained no confidential information in these interviews.[59] He also obtained confidential information from the petitions and probable-cause statements filed against Hall in the JDRC—records that were confidential under Virginia law and available to Saunders only in his capacity as Hall's lawyer.[60]

We cannot, of course, know all of the facts that Saunders learned through his representation of Hall, since these were and still are shielded by attorney-client confidentiality.[61] But we do know from inescapable inference that Saunders learned at least the following information, which he was thus barred from using in any way in his defense of Walter Mickens: Hall was living away from home, was in the legal custody of the Department of Social Services, and had a case worker assigned to him even before the events giving rise to the first of the current charges against him—assault and battery against his mother.[62] Saunders also knew (although the information remains closed to us) *why* Hall was in DSS custody.[63] Any competent lawyer representing Walter Mickens on a charge of capital murder for the killing of Hall who had obtained this kind of information by an independent

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[59] See note 50 *supra*, quoting 74 F. Supp.2d at 606.

[60] See note 17 *supra*.

[61] *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

[62] See text and notes at notes 24-26 *supra*.

[63] See JA 234:

"MR. HARRIS: . . .

"Q. Did you ask, and I'll add the same caveat as the Judge did, I'm not inquiring of any confidential information your client may have given you, but did you ask your client for any personal information about him at all?

"A. Since it was on the petition I asked him why the Department of Social Services has custody."

investigation and had *not* received it in confidence from Hall would obviously want to follow it up, both (1) for the purpose of seeing whether Hall's mode of life and circle of companions revealed a possibility of relations with his killer that could be put to use in Mickens' defense, and (2) for the purpose of anticipating and forestalling or rebutting family-centered victim-impact evidence of the sort likely to be presented at the sentencing phase of a capital trial involving a 17-year-old victim.[64] Saunders did not follow the information up—and could not, because of his conflict. In fact, Saunders did literally **no** investigation of Hall's background, proclivities, or life circumstances, although (a) a defensive strategy aimed at raising a reasonable doubt as to whether Hall consented to have sex with his killer could have eliminated the sole basis for a capital conviction (or dissuaded the prosecutor from insisting on a trial at which a death sentence could be sought, instead of engaging in negotiations looking to a lesser sentence[65]); (b) the location of Hall's body and other evidence suggested the likelihood that Hall had accompanied his killer to that out-of-the-way site for a sexual liaison;[66] (c) information in the Commonwealth

[64] Victim impact evidence is admissible in Virginia capital sentencing hearings. *Weeks v. Commonwealth*, 248 Va. 460, 476, 450 S.E.2d 379, 389-390 (1994). *Weeks* was foreshadowed in *George v. Commonwealth*, 242 Va. 264, 281-282, 411 S.E.2d 12, 22-23 (1991), which relied on *Payne v. Tennessee*, 501 U.S. 808 (1991).

[65] Saunders testified that the prosecutor closed the door to any possibility of plea negotiation at the outset (JA 223-224; see JA 152-153) and the district court found that this was so (74 F. Supp.2d at 609). However, the district court went on to recognize that "[o]f course, it is possible that evidence of a consensual encounter or adverse information about Hall might have prompted a willingness to negotiate" (*ibid.*) and it rejected *that* possibility only on the theory that "strategies based on those concepts were neither plausible nor viable." (*Ibid.*) We explain at pages 44-46 *infra* why the latter theory is radically unsound.

[66] As summarized by the district court: "Mickens points to the following facts that made consent a plausible defense strategy: (a) there



Attorney's file and in a newspaper article available to the defense raised the question whether Hall was not only "on the street" but engaging in homosexual prostitution;[67] and (d) information in the Commonwealth Attorney's file also suggested that Hall had a frightening encounter with a prostitute (whose gender cannot be ascertained on this record, because of Saunders' failure to make inquiries of any of three named individuals who might have jump-started an investigation of that subject) very near the place and time of his murder.[68] In all, the federal district court below—while finding a consensual-sex defense strategy "foreclosed" for

were no 'defensive' stab wounds; (b) there was no evidence that Hall was forced to the secluded area where he was found; (c) there were rumors that Hall was a male prostitute and that the area where Hall's body was found was a known gathering place for homosexuals; (d) there was no blood mixed with Mickens' semen stain on the mattress; and (e) the mattress where Hall's body was found had been used for sexual activity in the past." (74 F. Supp.2d at 607.) Judge Payne went on to say that "[e]ven if it is assumed that those five facts would have supported a consent defense, the record shows that other facts foreclosed presentation of consent as a plausible alternative defense strategy." (*Ibid.*) He rated "most importantly" among the latter facts the fact that "Mickens repeatedly professed that he had no involvement with Hall in any way." (*Ibid.*) We discuss at pages 44-46 *infra* why the idea that Mickens' denial of involvement "foreclosed" a consensual-sex defense is untenable. And the *other* "foreclosing" facts recited by Judge Payne (at *ibid.*) are simply facts from which an inference contrary to a consensual-sex scenario *might or might not* be drawn. Even if the issue were one of determining which scenario should be inferred on a fully developed record, the choice would not be foreordained. And of course that is not the issue. The issue is whether an *investigation which Saunders did not begin to conduct* into the possibility of a consent defense which the present record therefore can only imperfectly reflect was "a plausible alternative defense strategy."

[67] See note 21 *supra*.

[68] See note 23 *supra*. Other information in the file pointed to the possibility that at the time of Hall's death he was "ducking three guys" who had come looking for him to collect money he owed them. See text and note at note 22 *supra*.

reasons we will discuss at pages 44-46 below—concluded that Saunders' investigation of other possible defensive theories was deficient. (74 F. Supp.2d at 610-611 [one lead "should have been pursued" and was not; Saunders' "reasons for refusing to pursue [other leads] . . . are not defensible"].)

The district court put these deficiencies aside, in appraising Mickens' conflict-of-interest claim, because it could not determine that the conflict *caused* the deficiencies. Of Saunders' failure to pursue one line of investigation, the district court wrote: "The record discloses no reason for the failure to follow that lead other than Saunders' lack of perspicacity or perhaps indolence. Neither of those reasons bespeaks that he failed to act because of his previous representation of Hall." (*Id.* at 610.) As for Saunders' "refusing to pursue [another line of] evidence which pointed to the existence of an alternative perpetrator":

> "Mickens must do more than show that Saunders could, or should, have pursued a promising lead. He must also establish some link between the asserted actual conflict and the decision to forego further investigation of the lead. . . . Mickens has 'the burden of proving through a preponderance of the evidence' that Saunders 'would have' pursued the Thrash and Fleming leads 'but for' Saunders' professional relationship with Hall. . . . This, he has failed to do." (*Id.* at 611-612.)

All of this reasoning was adduced to support the district court's conclusion that Mickens had failed to show any "adverse effect" flowing from Saunders' representation of Hall, so it fails on the *legal* ground that "adverse effect" is irrelevant once an actual conflict of interests is found in a *Wood* situation. (See Part I.A above.) But a deeper problem with the reasoning is that it is incompatible with the basic premise of the Sixth Amendment [69] that a criminal defendant

[69] See, *e.g.*, *McCoy v. Court of Appeals of Wisconsin, District 1*, 486 U.S. 429, 438 (1988) ("In preparing and evaluating the case, and in advising the client . . . , counsel must consistently serve the client's interest to the best of his or her ability."); *Smith v. Robbins*, 528 U.S. 259, 278 (2000) ("[A]n indigent does, in all cases, have the right to have an attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments."); *Powell v. Alabama*, 287 U.S. at 59 ("It is not enough to assume that counsel [functioning under circumstances of diffused responsibility and inadequate opportunity to prepare] . . . thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts."); *Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("The paramount importance of vigorous representation follows from the nature of our adversarial system of justice.").



with his or her life at stake will have the services of dedicated, conscientious counsel.[70] Consistently with that premise, the rule cannot possibly be that when a conflict-ridden lawyer has *incomprehensibly* failed to pursue investigative leads which should have been pursued, and when a postconviction court is left in equipoise between the only two explanations for this failure—the lawyer's conflict or some speculative "indolence" or "lack of perspicacity"—the conflict claim should be rejected on the ground of this motivational ambiguity.

Three objective facts are patent on the record here and make the mysteries of Bryan Saunders' motivations immaterial. (A) Saunders had leads to information about Timothy Hall's background and circumstances that he was forbidden to use in the defense of Walter Mickens because he

[70] See, *e.g.*, AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 15 (1908), quoting GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (1854) (A lawyer "owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied."); AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Comment [1] to Rule 1.3 (1999), quoted in text at note 56 *supra*.

had obtained them as Hall's lawyer; (B) any conflict-free lawyer defending Walter Mickens would have undertaken an investigation of those aspects of Hall's background and circumstances, terminating it only if and when s/he developed information which—in his or her professional judgment *guided solely by Mickens' interests*—made it prudent to forgo further investigation; and (C) Saunders undertook no such investigation. This is to say that Saunders *limited* his investigation *although his duty to Hall*, which disabled Saunders from attending solely to Mickens' interests in deciding whether or not to pursue Saunders' unfavorable information about Hall, *ethically forbade Saunders to make the only judgment that could properly have justified such a limitation.* See *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984) ("strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation").[71] It is the inherent insolubility of Saunders' ethical dilemma—whether or not he subjectively "struggled with the ethical issues" (74 F. Supp.2d at 605)—that constituted an actual conflict of interests.

This conclusion cannot be avoided by supposing, as the district court did, that much of the "information [which Saunders failed to pursue] was irrelevant to Mickens' defense" (74 F. Supp.2d at 606). The district court's determination of irrelevancy rests on two related grounds. First, the court discerned no evidence in this record to "suggest that [Hall] . . . was a prostitute, much less that he consented to

[71] When strategic choices made by *unconflicted* counsel are challenged as incompetent, *Strickland* holds that they are entitled to "a heavy measure of deference." (*Id.* at 691.) But that is precisely because an unconflicted lawyer "is strongly presumed to have . . . made all significant decisions in the exercise of reasonable professional judgment." (*Id.* at 690.) And the uniform teaching of *Holloway*, *Sullivan* and *Wood* is that a conflict of interest makes that presumption untenable by eroding its first premise.



have sex with Mickens." (*Id.* at 604.) Second, it believed that Mickens' testimony denying any involvement in Hall's murder made a consensual-sex defense non-viable.[72] Both grounds are analytically untenable.

The first ground constitutes an impermissible bootstrap lift, of the sort that *Holloway* counsels courts to avoid. (See page 34 above.) The reason why *the present record* contains no direct evidence that Hall was a homosexual prostitute may well be *because* Saunders did not investigate available leads pointing to that possibility. The second ground has the same problem. The reason why Mickens testified as he did at trial may well be *because* he was deprived of the assistance of conflict-free counsel who, after conducting a proper investigation and evaluating the relative potential of alternative defensive options, would have been in a position to confer with Mickens about those options—including options that did not involve Mickens taking the witness stand, as well as options that could have resolved the prosecution with no trial at all. The second ground also has the problem of assuming, baselessly, that after adequate investigation and fact development, a capable lawyer in Mickens' case could not have argued at trial *both* that Mickens was not the person who killed Hall *and* that the prosecution had failed to prove beyond a reasonable doubt that **whoever** killed Hall did so in the course of an attempted forcible sodomy rather than after attempted consensual sex. *Some* criminal defense attorneys might regard such alternative defenses as relatively weaker than a single-theory defense in *some* cases—depending on the specific facts unearthed by investigation—but that is a far cry from supporting the district court's view that Mickens'

[72] See *id.* at 606 with a cross-reference to *id.* at 607; and see *id.* at 606 n. 15: "For example, Hall's criminal history might have had some relevance to Mickens' case, if Mickens' testimony had not foreclosed any theory of self-defense."

testimony of non-involvement categorically "foreclosed any theory of self-defense" (74 F. Supp.2d at 606 n. 15).

In short, as the panel majority below perceived, "[t]he district court erred as a matter of law [in concluding that Saunders suffered no actual conflict of interest] because it focused too narrowly in describing the circumstance . . . where confidential information might be relevant or useful . . . . The proper inquiry . . . is whether Saunders' interest (or duty) in maintaining Hall's secrets and confidences diverged from Mickens' interest in pursuing a . . . reasonable pretrial investigation." (227 F.3d at 215-216.) Throughout his investigation of defensive options on behalf of Walter Mickens, Saunders "actively represented conflicting interests." (*Sullivan*, 446 U.S. at 350.) That is the defining feature of an "actual conflict of interest" (*id.* at 349) and suffices to entitle Mickens to relief under *Wood*.

## II. IF A SHOWING OF ADVERSE EFFECT WERE REQUIRED, IT WOULD NOT BE THE ONE THE FOURTH CIRCUIT USED TO DENY POSTCONVICTION RELIEF IN THIS CASE

Even if the *en banc* majority below had not erred in requiring Mickens to show an "adverse effect" as well as an actual conflict of interests, its application of the adverse-effect requirement to this record would be unsustainable. The Fourth Circuit's (and the district court's) approach to "adverse effect" misreads *Sullivan*, disregards the basic insight of *Holloway*, and blurs the clear line between this Court's conflict-of-interest jurisprudence and its general ineffective-assistance-of-counsel jurisprudence.

The Fourth Circuit construed the "adverse effect" prong of *Sullivan* as obliging Mickens to prove a cause-and-effect connection between "the actual conflict" harbored by Saunders and Saunders' "failure to pursue [a viable defense] . . . strategy or tactic." (240 F.3d at 361; see pages 19-21 above.) This meant, in the Fourth Circuit's view, that Mickens' claim to postconviction relief foundered on the adverse-effect prong whenever the district court found that an aspect of Saunders' performance either (A) was "unrelated" to Saunders' conflict in the sense that the conflict did not motivate Saunders to behave as he did, or (B) was a course of behavior that a competent, unconflicted lawyer might have chosen to take. (See text and notes at notes 33-35 *supra*.)



*Sullivan* does not—in the cases where it requires a showing of adverse effect—require *this* kind of showing. The showing demanded by the Fourth Circuit conflates "adverse effect" with prejudice, while *Sullivan* takes pains to distinguish the two. (446 U.S. at 349-350.) *Sullivan*'s "adverse effect" inquiry is whether "a conflict of interest actually affected the adequacy of . . . [the defendant's] representation" (*id.* at 349). Its focus is *impeded representation*, not simply whether the lawyer was illicitly motivated to act in a way that damaged his or her client's interests.

Doubtless, in some situations it may happen that the way in which a conflict of interests impacts upon the quality of a client's representation is that it induces the lawyer to take action inimical to the client's interest. But that is not always so; and it needs not be so in Walter Mickens' case. Here, Saunders' continuing duties to his former client, Hall, *ethically precluded* Saunders from evaluating lines of investigation into Hall's history and circumstances, potentially relevant to Mickens' defense, *unfettered by obligations of loyalty to anyone other than his present client, Mickens*. In this situation, Saunders' subjective reasons for his investigative decisions are irrelevant, because he could not have made *any* decisions on this subject—for *any* reasons—without violating ethical constraints. If he considered only Mickens' interests in deciding whether to pursue information about Hall that he had acquired as Hall's lawyer, Saunders violated his responsibilities to Hall. If he did *not*, he violated

his responsibilities to Mickens. Whatever his subjective motivations may have been, the objective fact is that he was ethically *forbidden* to adopt the only motivational stance that a lawyer representing Mickens was permitted to have—a stance of undivided loyalty to Mickens. This "affected the adequacy of [Mickens'] . . . representation" in the most basic way.

The Fourth Circuit's misapplication of the adverse-effect requirement was compounded by two additional errors. First, like the district court,[73] the *en banc* majority of the Court of Appeals accepted the record made by Saunders himself as constituting ultimate, unchangeable reality for the purpose of determining whether any of his failings harmed Mickens. (See text and note at note 36 *supra*.) Thus, the *en banc* majority endorsed the district court's finding that "Mickens denied ever meeting Hall," and it reasoned from this that "[b]ecause Saunders was entitled to rely on the information provided by his client, consensual sodomy was not a viable defense strategy at the time that Saunders made his decision not to pursue it." (240 F.3d at 261.)[74] It would be more

[73] See notes 28 and 36 and pages 15-16 *supra*.

[74] It offered a second ground for the same result: "[t]he district court concluded that a consent defense was not viable because of evidence that Hall had been subjected to a choke hold and stabbed some 140 times before or during the act of sodomy or attempted sodomy." (240 F.3d at 261.) The district court's version of this reasoning was that "there were blue marks on Hall's neck which evinced use of a choke hold on Hall, a circumstance inconsistent with consent. . . . [Also,] the bloody transfer stains on the back of Hall's thighs indicated that the attacker stabbed Hall before or during the attempted sexual activity, thereby making consent a rather implausible alternative theory. As Keeling, Mickens' other counsel, remarked, 'I would imagine that when the choking of the victim or the stabbing of the victim started happening that [any] consent would have been revoked.' " (74 F. Supp.2d at 607.) The reasoning fails for lack of a necessary premise. It assumes the jury must have found from the physical evidence that the choking and stabbing of Hall preceded or accompanied the sexual activity constituting attempted forcible sodomy. This was a possible jury finding, but so was the converse: that Hall's attacker was incited to homicidal fury by something that happened *after* sex play ended unsatisfyingly. The medical examiner expressed no opinion as to when the choke marks were inflicted in the sequence of events (except that, if they were inflicted *post mortem*, it would have had to be shortly after death) (JA 86); she could not draw any inferences about the relative timing of Hall's wounds (JA 71; see also JA 87); and the crime scene technician who described the transfer stains offered no opinion as to what caused them (JA 16-17). Even if they resulted from Hall's killer straddling Hall's body, there is no particular reason to believe that the killer was attempting sexual activity rather than pinioning Hall while stabbing him.



accurate to say that *unconflicted* counsel are entitled to *choose* whether they will rely on information from their clients or conduct an independent investigation. Some choose the latter course and obtain information which they use effectively in counseling their clients with respect to defense options that include theories not based upon the client's testimony. Some choose the former course, in some situations. But *conflicted* counsel are in no position to make such choices in their clients' interests; so a record resulting from conflicted counsel's failure to investigate is an unreliable basis for determining whether uninvestigated defense strategies were viable. (*Holloway*.)

Second, as is manifest in the passage just quoted, the Fourth Circuit *en banc* majority essentially held that Saunders' conflict would not be deemed to have had an adverse effect on Mickens' case if an unconflicted lawyer might have followed the same course of action Saunders followed, and if s/he would not be held incompetent for doing so. (See text and note at note 34 *supra*.) This standard of "adverse effect" makes the Sixth Amendment conflict-of-interest rules laid down by *Sullivan* a study in superfluity, displaced by *Strickland*'s ineffective-assistance standards for *unconflicted* counsel. Besides scuttling *Sullivan*, it flies in the teeth of *Strickland*'s own recognition that conflict-of-interest cases are *sui generis* (466 U.S.at 692-693).

## CONCLUSION

The decision below denying Walter Mickens, Jr. post-conviction relief is wrong and should be reversed.

Respectfully submitted,

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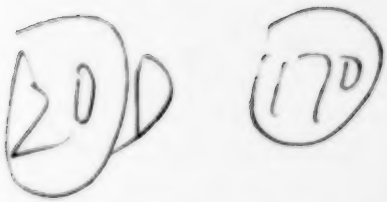

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No. 00-9285

In The

# Supreme Court of the United States

WALTER MICKENS, JR.,

*Petitioner,*

v.

JOHN B. TAYLOR, WARDEN, SUSSEX I STATE PRISON,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF OF RESPONDENT

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## QUESTION PRESENTED

Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?

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## STATEMENT OF THE CASE

### I. The Crime

On Monday, March 30, 1992, the body of seventeen-year-old Timothy Jason Hall was discovered on a bank of the James River in downtown Newport News, Virginia, lying face down on a mattress and partially covered by a sheet of plywood. (JA 15). Hall's body was nude from the waist down, except for socks, and his legs were spread apart approximately twelve inches. (JA 15-16, 18). The mattress was underneath the overhang of an abandoned construction company on 29th Street. (JA 9).

As petitioner concedes, the murder was particularly violent and gruesome. The autopsy identified 143 stab wounds. (JA 11). Most of the wounds were "paired" stab injuries which were consistent with two blades opened on a "Swiss Army" knife. (JA 13). The medical examiner also identified thirteen single stab wounds, one extending three and a half inches into Hall's head. (JA 11-12). The photographs of the victim show most of the wounds clustered on Hall's back and shoulders, and the back and top of his head, indicating he was attacked from behind. (JA 399-404). Hall's face had been sliced across the forehead and nose by long, "paired" incised wounds. (JA 401-402). Twenty-five wounds caused significant enough damage to internal organs and blood vessels to be classified as lethal injuries, but none would have caused immediate death. (JA 12). Hall bled to death after approximately 40 minutes. (JA 13).

There were no defensive wounds noted on the victim's body. (JA 12). Bruising on Hall's neck was consistent with a chokehold. (JA 11, 86-87). There were no injuries to Hall's penis, scrotum or anal ring. (JA 14).

At the scene, police noticed bloody "transfer stains" on the outside of the victim's thighs and a substance resembling suntan lotion close to the victim's anus. (JA 16-17). The police also recovered pubic hairs from Hall's buttocks, and semen stains from the mattress. (JA 16-17). Hall's blue jeans and underwear were found washed up at the river's edge. (JA 18). His shoes were not found at the murder scene.

For "two or three months" before his death, Tim Hall was living with fourteen-year-old Raheem Gordon and Raheem's father, Bernard Gordon, in an apartment at 28th and Washington Streets near the James River in downtown Newport News. (JA 19). Tim and Raheem shared a bedroom and also often shared clothing. (JA 20). Raheem last saw Tim alive on Saturday evening, March 26, 1992, when Hall gave Raheem a ride to a party at the nearby Towers Apartments. Tim was wearing a pair of Raheem's Nike sneakers. (JA 20). Hall was expected to attend the party later in the evening. Evidence at the Gordons' apartment indicated that Hall had returned there at some point after 9:30 p.m. and changed shirts, but never arrived at the party. Raheem was not concerned with his friend's absence on Sunday, thinking that Tim might have stayed at his mother's home. On Monday, Raheem and his father noticed the police bringing a body up from the river and learned at that time that Hall had been killed. (Tr. 5/26/93, pp. 564-569).



On Saturday, April 4, 1992, police responded to a call that a man had assaulted a juvenile. The officers found Mickens on a bicycle in the parking lot of the abandoned construction company next to the river. Mickens attempted to elude the police but was arrested nearby on the assault charge. (JA 27, 35-37). After being advised of the *Miranda* warnings, Mickens was questioned about the Hall murder. Mickens displayed guilty knowledge when he volunteered, "You didn't find any knife on me, did you," before police had mentioned how Hall was killed. (JA 28-29). The police watched Mickens "break into a full sweat to the point where he had sweat dripping off his nose and his face" when they discussed DNA testing of trace evidence. (JA 28-29).

Mickens was served with arrest warrants for the murder of Timothy Hall on the morning of Sunday, April 5, 1992. While the detective read the warrants aloud, Mickens "put his fingers in his ears" and "rocked back and forth" in his chair. (JA 37). He stopped rocking to review the photographs of his victim and then said, "I accept the warrants, I accept the charges." (JA 38, 399-404). He then explained, "Mother fucker, if I told you I accept the warrants that means I'm guilty, don't it. Take me to jail, I want to go to jail, I want to go now, I want to go now." (JA 39-40).

Two days later the police found Michael Jacobs, a local drug addict, wearing the Nike sneakers that Tim had been wearing when Raheem last saw him. (JA 20-21, 23). Jacobs had purchased the shoes from Mickens for $5.00 the previous week. (JA 23).

## II. The Trial and First Appeal

Because Mickens' victim was a juvenile, the preliminary proceedings were conducted in juvenile court. *See* Va. Code § 16.1-241(I). On April 6, 1992, a juvenile court judge appointed Bryan Saunders and Warren Keeling to represent Mickens on the capital murder and related charges. (JA 2).[1]

As petitioner concedes, the prosecution had a very strong case proving Mickens' guilt. In addition to Mickens' guilty knowledge, inculpatory statements and previous possession of the murdered boy's shoes, a forensic expert in hair analysis matched Mickens' pubic hair sample to the hairs recovered from Hall's buttocks "in all identifiable microscopic characteristics." (JA 32). The fact that the hairs still had tissue attached to the roots indicated that they had been forcibly removed, consistent with the rubbing of Mickens' genitals against Hall's buttocks. (JA 33-34). DNA testing on a human sperm stain

[1] The form order for the appointment of counsel printed in the Joint Appendix is incorrect. It lists only "B. Saunders" as the attorney appointed. (JA 2). The actual form lists Saunders *and* Warren Keeling. *See* photocopy in Fourth Circuit Joint Appendix, Volume I, page 1. Mickens originally had been charged with two capital murders, one involving Hall and another involving Jonathan Woskobonik. (Fed. Hearing Tr. 1/13/99, pp. 38-39). Woskobonik also had been stabbed over 70 times and his body also was found naked from the waist down. (*Id.* at p. 65). Saunders and Keeling were combined as counsel on both cases. (*Id.* at 39). The Commonwealth, however, did not prosecute the Woskobonik case.



found on the mattress excluded Hall as a contributor, but matched Mickens' DNA profile. (JA 29-30).

Other evidence showed that Mickens was seen acting suspiciously in the area near the riverside location at about the same time as Hall last was seen alive. Two of Raheem's friends left the party at the Towers Apartments at approximately 8:00 p.m. and sat for a while in a park adjacent to the apartments and the riverside. They saw Mickens hiding in the bushes, looking at them. (JA 21-22; Tr. 5/26/93, p. 605).

The prosecution also presented the testimony of Tyrone Brister, who had shared a holding cell with Mickens in March of 1993.[2] In discussing with each other why they were in custody, Mickens stated: "They said I stabbed somebody 140 something times in the head," and then, in a low voice, said, "Which I did." (JA 26). Mickens also related to Brister that the police had accused him of sodomizing his victim and stealing his sneakers. Again Mickens lowered his voice and said, "which I did." (*Id.*).

Mickens was tried before a jury in the Newport News Circuit Court on May 24-June 2, 1993, on indictments charging the capital murder of Timothy Hall in the commission of attempted forcible sodomy and a separate

[2] Brister was not a typical "cell mate" witness. He had been incarcerated briefly, released in March 1993, and was not subject to receiving any benefit for his testimony. He contacted the prosecutor the night before Mickens' trial started. (Tr. 6/1/93, p. 681). Brister reported that Mickens acknowledged killing *two* people. (JA 24-25). Prior to his testimony, the trial judge and prosecutor instructed Brister not to mention the second murder. (JA 25; Tr. 6/1/93, p. 703).

charge of attempted forcible sodomy. The Commonwealth presented the evidence outlined above. For the defense, Catherine Mickens, petitioner's mother, testified generally that Mickens always arrived home before dark. (JA 42). Mickens testified that he was at home every night by 9:00 p.m. (JA 44). Mickens specifically denied killing, or even knowing, Tim Hall. (JA 44-45, 47).

The jury convicted Mickens of both charges. (Tr. 6/3/93, p. 999). In a separate capital sentencing proceeding on June 4, 1993, the prosecution presented evidence of Mickens' prior convictions, parole violations, and the testimony of several victims of Mickens' prior crimes. (Tr. 6/4/93, pp. 1039-1059). The defense presented character evidence from a family friend and Mickens' aunt. (Tr. 6/4/93, pp. 1059-1066). Mickens' mother and sister testified about his upbringing. (Tr. 6/4/93, pp. 1067-1079). Mickens addressed the jury, repeated his denial of involvement in these crimes, and expressed sympathy for Hall's family. (Tr. 6/4/93, pp. 1089-1091). On June 7, 1993, the jury sentenced Mickens to death, finding both the future dangerousness and vileness aggravating factors. (Tr. 6/7/93, pp. 1144-1145).

The Virginia Supreme Court affirmed the convictions and death sentence on direct appeal. *Mickens v. Commonwealth*, 442 S.E.2d 678 (Va. 1994) (*Mickens I*). This Court, however, remanded the case for reconsideration following the decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994), *see Mickens v. Virginia*, 513 U.S. 922 (1994), and the Virginia Supreme Court ordered a new sentencing hearing. *Mickens v. Commonwealth*, 457 S.E.2d 9 (Va. 1995) (*Mickens II*).



## III. The Second Sentencing

A second jury was selected for a new sentencing hearing held February 5-8, 1996. The Commonwealth again presented the evidence concerning the murder, Mickens' parole history, and prior felony convictions: attempted grand larceny from the person in 1973; sodomy, robbery and grand larceny in 1974; and sodomy and robbery in 1980. (JA 87-88, 91-92). Charles Siron, one of the sodomy victims, testified that Mickens assaulted him in the Newport News City Jail in 1974, by putting a razor blade to his throat at night while he was sleeping, and forcing him into a shower area where he sodomized him. (JA 88-89). Ruby Bunn, a school teacher and one of the robbery victims, described how Mickens came into her second grade classroom, demanded her pocketbook and held a knife a few inches from a child's head while she gave Mickens her money. (JA 90-91).

Mickens again presented the testimony of his mother about his upbringing. (Tr. 2/7/96, pp. 454-458). However, this time counsel also took advantage of the fact that the second jury would be told of Mickens' parole ineligibility: counsel presented the testimony of Darius Robinson, an employee of the Virginia Department of Corrections, who described the living conditions Mickens would experience if sentenced to life imprisonment without parole, and Jacquelyn Brown, Mickens' prison counselor, who testified that Mickens had adjusted to confinement. (JA

92-96; Tr. 2/7/96, pp. 452-454).[3] The jury found both statutory aggravating factors and sentenced Mickens to death. After considering a probation report and other evidence presented during a post-sentencing hearing on March 29, 1996, the trial court imposed the sentence fixed by the jury. (JA 99-102).

## IV. The Second Appeal and Habeas Corpus Proceedings

On appeal, the Virginia Supreme Court upheld Mickens' death sentence, *Mickens v. Commonwealth*, 478 S.E.2d 302 (Va. 1996) (*Mickens III*), and this Court denied certiorari on June 9, 1997. *Mickens v. Virginia*, 520 U.S. 1269 (1997). On November 7, 1996, the Newport News Circuit Court appointed counsel to represent Mickens for his state court habeas corpus proceeding. *See* Va. Code § 19.2-163.7. (JA 133). A habeas corpus petition was filed in the Virginia Supreme Court on August 7, 1997, and dismissed on December 15, 1997. (JA 126). Mickens did not raise any allegation of a conflict of interest. (JA 103-123).

## V. The Federal Habeas Corpus Proceedings

On June 25, 1998, Mickens filed a federal habeas corpus petition in the United States District Court in Richmond and asserted for the first time that one of his two trial attorneys, Bryan Saunders, had had a conflict of

[3] Petitioner refers to the mitigation evidence as "scant" (Pet. Brief at 5), but never has identified any additional mitigation evidence.



interest because he previously had represented Tim Hall. The district court conducted an evidentiary hearing on January 13, 1999, which revealed the following:

Tim Hall's mother swore out an assault and battery complaint against her son on February 21, 1992, alleging that Hall grabbed her and shoved her to the floor in their home. (JA 393, 394). Approximately three weeks later, Hall was charged with possession of a concealed weapon after a policeman searched Hall's car pursuant to a traffic stop and discovered a serrated bread knife wrapped in newspaper. (JA 391, 392). A juvenile detention hearing was held on March 20, 1992, and Substitute Juvenile Court Judge Paul Criver appointed Bryan Saunders to represent Hall for both charges. (JA 396). The hearing was continued until April 3, 1992. (*Id.*).

Between March 20 and March 28, 1992, Hall met with Saunders one time, at Saunders' law office, for fifteen to thirty minutes. (JA 189). Saunders spoke with Hall only about the two charges. (JA 234-237). He learned that Hall's mother would not be pursuing the assault charge. (JA 222). He previously had determined that inadequacies in the police probable cause statement provided a legal defense to the "concealed weapon" charge. (JA 190, 221-222).

Unbeknownst to Saunders, on Friday, April 3, the date scheduled for Hall's detention hearing, Juvenile Court Judge Aundria Foster made an entry in the juvenile court's docket sheet, stating: "Remove from docket Def. deceased." (JA 390). When Saunders arrived for the hearing, he was told by someone outside of court that Hall was dead and the charges dismissed. (JA 143, 188).

Mickens was arrested on Saturday, April 4, 1992. On Monday, April 6, 1992, Juvenile Court Judge Foster appointed Saunders and Warren Keeling to represent Mickens. (JA 2). Judge Foster also conducted the preliminary hearing on July 17, 1992. Saunders successfully persuaded Judge Foster that no probable cause existed for two charges – abduction and robbery – and those charges thus were not certified to the circuit court for trial. (JA 254-255). Saunders and Keeling represented Mickens in the juvenile court proceedings, the 1993 trial, the 1996 resentencing, and both direct appeals.

An article published in a Newport News newspaper shortly after Hall's murder contained interviews with several of Hall's friends. One friend speculated that Hall might have been a homosexual prostitute, but the same article contradicted that assertion. (JA 397-398). The article described Hall's assault charge as based on an incident where Hall pushed his mother during an argument. (JA 398). Hall's friends also reported that the police had "picked him up" for carrying a concealed weapon. (*Id.*). The article referenced the fact that Hall had a social worker and was living with the Gordon family at the time of his death. (*Id.*).

Saunders' co-counsel, Keeling, was lead counsel for sentencing. (JA 157-158, 172-173, 183). He read the newspaper article and knew about Hall's juvenile charges and the speculation about his prostitution. Keeling investigated but found no evidence to indicate that Hall was a prostitute. (JA 162-164, 168-169, 173-177, 179). Saunders reviewed police reports concerning the early investigation of Hall's murder and noted several instances where friends and associates of Hall had provided information



about Hall's activities before his death and leads concerning individuals who might have harmed Hall. (JA 205-206, 207, 424, 426-427). Saunders could not recall in the 1999 evidentiary hearing all the details of the investigations he had conducted in 1992 concerning these "leads." (JA 207, 209-210, 229). Mickens offered no evidence during the evidentiary hearing to show that Hall had been a homosexual prostitute, that any additional "negative information" about Hall existed, or that any of the "leads" could be confirmed.[4] Mickens did not testify.

The district court found that Mickens had failed to demonstrate an actual conflict of interest or any adverse effect resulting from Saunders' prior representation of Hall. *Mickens v. Greene*, 74 F.Supp.2d 586, 615 (E.D. Va. 1999). (JA 309). First, the district court found that "Mickens has failed to demonstrate a correlation, much less a substantial and particular relationship, between Saunders' representation of Hall for assault and possession of a concealed weapon and his representation of Mickens on attempted forcible sodomy and capital murder charges." (JA 289). "Saunders' representation of Hall was very limited in scope and duration." (JA 288). The

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[4] The district court granted Mickens' discovery of Hall's juvenile files maintained by the social services agency and provided funding for an investigator to assist in developing the factual support for a conflict of interest claim. (JA 126-127, 130-131, 139-140, 256-257). In responding to the Warden's motion to dismiss the federal habeas petition, Mickens offered an affidavit from his investigator containing hearsay to the effect that individuals in Hall's neighborhood reported rumors of Hall's supposed "prostitution." (JA 137-138). However, no evidence to that effect was presented in the federal hearing.

representation of Hall did not involve the same subject matter as the charges facing Mickens and did not involve the same criminal transactions, events or witnesses. (*Id.*).

Second, the district court found as a matter of fact that Saunders' brief contacts with Hall had not produced information from the attorney-client relationship that had any relationship to Mickens' case. "[T]he record here confirms that Saunders did not learn any confidential information from Hall that was relevant to Mickens' defense either on the merits or at sentencing." (JA 291). Saunders had obtained knowledge of Hall's juvenile charges, but that information simply was not relevant to Mickens' defense because of Mickens' testimony. (JA 292).

Third, the district court disapproved of Saunders' failure to appreciate the ethical issues posed in these circumstances but, after hearing the testimony and considering petitioner's evidence, found that Mickens failed to establish that Saunders possessed any personal interest in concealing the alleged ethical conflict in representing Mickens. "[T]he evidence shows that, regrettably, Saunders never struggled with the ethical issues envisioned by Mickens." (JA 290). However, "the Court is unconvinced that . . . selfish 'loyalties or interests' existed, much less motivated Saunders' silence" about the prior representation of Hall. (JA 304).

Fourth, the district court carefully considered and rejected Mickens' allegations of an "adverse effect": it found that a "consent defense" was an "implausible alternative theory" foreclosed by the evidence, including



choke marks found on the victim's neck, blood stains on Hall's thighs, the 143 stab wounds, and Mickens' own insistence that he did not know Hall and had no involvement in these crimes. (JA 293-294). "Saunders discarded consent as a strategy not because of any loyalty to Hall, but because neither the facts nor Mickens' testimony was compatible with such a strategy." (*Id.*).

The district court further determined that using "negative information" about Hall at sentencing, based on a premise that it would mitigate the severity of a capital murder, was inconsistent with Mickens' own statements of innocence and sympathy and would have appeared disingenuous. (JA 295). The court found that, despite "diligent investigation by federal habeas counsel," Mickens had failed to uncover any evidence that Hall was a male prostitute. (JA 295). It found that such evidence would have been useful only in connection with the unavailable consent defense, and "the propensity of that approach to backfire made it an unreasonable alternate strategy or tactic at sentencing." (JA 295). The Court noted that even if such "negative information" existed and could be considered as offering a plausible strategy, it was Mickens' second lawyer, Keeling, and not Saunders, who was in charge of preparing for sentencing and Keeling not only was aware of Hall's juvenile charges and other circumstances of his life from a newspaper report, but did not consider any of that information relevant. (JA 296).

The court found that Saunders had not engaged in extensive plea negotiations because the Commonwealth's Attorney had rejected any plea agreement for a sentence less than death. (JA 296-297). The court determined that

using information about Hall's juvenile charge of assaulting his mother to "rebut" her 1996 victim impact statement containing assertions of grief would have been inconsistent with Mickens' statements of sympathy towards Hall's family and, in any event, not a viable tactic in the context of Virginia's sentencing process. (JA 297-299). Mickens' allegations that Saunders conducted a deficient investigation into leads about other possible suspects were rejected by the district court because they lacked any connection to the alleged actual conflict. "Mickens may carry this burden by showing that pursuit of these leads was inherently in conflict with Saunders' other loyalties or interests or by other probative evidence that he did not pursue the leads because of those interests. This he has failed to do." (JA 303).

Finally, the district court determined that the state juvenile court judge had the "capacity to connect" Mickens' charge with the deceased defendant, and that the "heinous nature of the crime and the publicity it received" made it unlikely that the connection would escape notice. (JA 307). Because Mickens was charged with a capital crime, the district court deemed Juvenile Court Judge Foster "no doubt aware" that Mickens might need to counter victim impact evidence. (JA 308). The district court thus concluded that this prospect constituted under *Wood v. Georgia*, 450 U.S. 261 (1981), a "potential conflict" that Judge Foster should have recognized when she appointed Saunders. (JA 307-308). The district court, however, did not read *Wood* as requiring an automatic reversal. Rather, the federal evidentiary hearing had clarified the fact that the possible conflict of interest "never ripened into an actual conflict nor was Saunders'



advocacy impaired." (JA 309). In the absence of an actual conflict adversely affecting Saunders' representation, the district court concluded that Mickens had failed to prove that the alleged conflict "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions," and therefore he could not demonstrate "prejudice" from his state court default.[5] (JA 309).

A divided Fourth Circuit panel disagreed with the district court's determination that no actual conflict had been shown. *Mickens v. Taylor*, 227 F.3d 203 (4th Cir. 2000). (JA 318-354). The panel majority found an actual conflict of interest from what it divined as Saunders' personal interest in concealing the previous Hall representation. (JA 336). Additionally, the panel majority asserted that the Hall representation impaired Saunders' ability to investigate Hall's background and a possible "consent" defense. (JA 338-341). The panel majority believed that *Wood v. Georgia* required "reversal" if: (1) the trial court failed to inquire even though it knew or reasonably should have known of an "apparent conflict;" (2) the defendant did not waive conflict-free counsel; and (3) an actual conflict of interest existed. (JA 328).

The Fourth Circuit granted the Warden's petition for rehearing *en banc* and in a 7-3 decision affirmed the district court's denial of habeas corpus relief. *Mickens v.*

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[5] It is uncontested that Mickens' conflict claims were defaulted because they never were raised in state court. (JA 280). The district court found that the confidential nature of Saunders' juvenile court representation of Hall provided "cause" for the failure to raise the claims in state court. (JA 280-283).

*Taylor*, 240 F.3d 348 (4th Cir. 2001) (*en banc*). (JA 355-389). The majority concluded that *Wood v. Georgia* did not change the rule of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), requiring a petitioner to demonstrate that an actual conflict adversely affected his attorney's representation when no objection to the representation was raised at trial. (JA 371-372). Because Mickens had not demonstrated that the alleged conflict adversely affected Saunders' representation, the *en banc* majority affirmed the denial of federal habeas corpus relief. (JA 372-377). The court specifically declined to decide whether the juvenile court judge who appointed Saunders knew or should have known of a potential conflict of interest because of Saunders' previous representation of Hall (JA 366), and also specifically declined to reach Mickens' argument that he had established an actual conflict. (JA 372).

## SUMMARY OF ARGUMENT

*Wood v. Georgia* did not alter existing precedent that required a petitioner to demonstrate a Sixth Amendment violation by proof of an actual conflict that adversely affected counsel's performance. The Court's reference to "actual conflict" in the *Wood* remand order necessarily included the meaning that term had been given in *Cuyler v. Sullivan* less than a year before. The Court discussed the "actual conflict" in *Wood* in terms of a conflict that adversely affected the representation. Mickens' argument that *Wood* silently overruled or otherwise altered in any way *Sullivan*'s statement of the Sixth Amendment standard simply by omitting in the remand order the words,



"that adversely affected counsel's representation," cannot be defended by reference to *Wood*.

The district court conducted a thorough evidentiary hearing and made findings of fact that the two representations were entirely unrelated, Hall's juvenile charges produced no confidences that could be relevant to Mickens' defense, and Saunders in fact recognized no ethical conflict that would have created a conflicting personal interest. The district court's findings, which no judge of the court below even challenged, cannot be deemed clearly erroneous and are binding in this case. The *en banc* decision of the Fourth Circuit correctly held *Sullivan* and *Wood* to require a showing of actual conflict and adverse effect, and that Court correctly rejected Mickens' claims on the strength of the district court's findings because petitioner failed to show that the Hall representation had any effect on Mickens' case.

## ARGUMENT

### I. THE COURT OF APPEALS CORRECTLY HELD THAT A FEDERAL HABEAS CORPUS PETITIONER MUST SHOW AN ACTUAL CONFLICT OF INTEREST AND AN ADVERSE EFFECT TO ESTABLISH A SIXTH AMENDMENT VIOLATION WHERE A TRIAL COURT FAILS TO INQUIRE INTO A POTENTIAL CONFLICT OF INTEREST ABOUT WHICH IT REASONABLY SHOULD HAVE KNOWN.

The question presented in this case must be answered in the context of a prisoner seeking to void a presumptively valid state court final judgment in a federal habeas

corpus action based upon a defaulted claim of trial court error. Two courts now have determined that the conflict of interest Mickens alleged had no effect on the fairness of Mickens' trial or the reliability of his convictions. Settled precedent forecloses federal court review of Mickens' defaulted allegation absent a demonstration of both cause for his default and actual prejudice flowing therefrom. *See Gray v. Netherland*, 518 U.S. 152, 161-162 (1996). Even for preserved claims, a federal habeas petitioner must demonstrate that an interference with the right to counsel had some effect on the judgment, *see Strickland v. Washington*, 466 U.S. 668, 691 (1984), *United States v. Morrison*, 449 U.S. 361, 364-365 (1981), and in conflict cases this means showing that counsel "actively represented conflicting interests" before "prejudice" will be presumed. *Sullivan*, 446 U.S. at 350. *Wood v. Georgia* provides no reason for this Court to abandon precedent and award Mickens habeas corpus relief on a defaulted claim without having demonstrated any "prejudice," or to find a Sixth Amendment violation in the absence of any effect on the lawyer's representation or the state court judgment.

In *Wood*, on direct review of petitioners' probation revocation, this Court identified circumstances in the record which strongly suggested that petitioners' counsel had a conflict of interest. The attorney "may not have pursued [petitioners'] interests single-mindedly," but, because the parties had not briefed, argued or developed the record on the issue, the Court could not be "sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him." 450 U.S. at 271-272. The trial court had sufficient



notice of an "apparent" conflict but had failed to inquire. *Id.* at 272. This Court ordered the case returned to the state trial court to conduct a hearing: "If the court finds that an actual conflict of interest existed at that time, and that there was no valid waiver of the right to independent counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests." *Id.* at 273-274.

Solely on the basis of this statement, Mickens argues that *Wood* changed the standard governing conflict claims. He asserts that the state juvenile court judge who appointed counsel should have initiated an inquiry into the possibility of a conflict of interest because of Saunders' previous representation of Hall. Under Mickens' view of *Wood*, the absence of such an inquiry means that he may obtain federal habeas corpus relief by showing an "actual conflict" without regard to whether it had any effect whatsoever on counsel's representation.

Mickens' argument, however, rests on a fundamental misunderstanding of this Court's Sixth Amendment jurisprudence. At the time *Wood* was decided, this Court already had established certain well-defined requirements for a valid Sixth Amendment conflict of interest claim. Since the direct appeal decision in *Glasser v. United States*, 315 U.S. 60 (1942), it has been settled that the Sixth Amendment right to the effective assistance of counsel contemplates the assistance of a lawyer who is not burdened with conflicting interests. *Id.* at 70. At the same time, *Glasser* also clearly demonstrated that joint representation was not a per se violation of the Sixth Amendment right to counsel. The district court had appointed

Glasser's retained counsel to serve as counsel for a codefendant, Kretske, despite Glasser's objection and his attorney's warning of a possible conflict of interest. At the joint trial for conspiracy, counsel failed to cross-examine a prosecution witness who implicated Kretske, but not Glasser, and failed to object to arguably inadmissible testimony linking Glasser to the conspiracy. These failures "luminate[d] the cross-purposes under which [counsel] was laboring," *id.* at 73, and demonstrated that counsel's "struggle to serve two masters cannot seriously be doubted." *Id.* at 75. Having demonstrated the damaging conflicting interests, Glasser was not obligated to prove that the conflict prejudiced his defense: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to engage in nice calculations as to the amount of prejudice arising from its denial." *Id.* at 76. Kretske, on the other hand, was not entitled to relief because he had not demonstrated how the denial of Glasser's right to counsel had prejudiced him. *Id.* at 76-77.

In *Holloway v. Arkansas*, 435 U.S. 475 (1978), another direct appeal case, the Court reaffirmed the view that joint representation did not presumptively establish constitutional error.[6] A public defender had been appointed to represent three codefendants who were tried together. The attorney unsuccessfully moved the trial court to

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[6] "One principle applicable here emerges from *Glasser* without ambiguity. Requiring or permitting a single attorney to represent codefendants . . . is not per se violative of constitutional guarantees of effective assistance of counsel." *Holloway*, 435 U.S. at 482.



appoint separate counsel for each defendant because his confidential communications with the men indicated a real risk of conflicting interests. The state court also denied a similar motion renewed on the day of trial, after each defendant indicated his desire to testify and after counsel represented that his knowledge of confidences removed his ability to question them. *Id.* at 477-478. This Court held that the trial court's ruling denied the defendants "the guarantee of assistance of counsel." *Id.* at 484. The decision acknowledged that lower courts since *Glasser* had "differed on how strong a showing of conflict must be made, or how certain the reviewing court must be that the asserted conflict existed," and had disagreed concerning "the scope and nature of the affirmative duty of the trial judge," but *Holloway* resolved neither issue. *Id.* at 483. Instead, this Court relied upon trial counsel's representations because the attorney was "in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop," and had acted on his "obligation, upon discovering a conflict of interests, to advise the court at once of the problem." *Id.* at 485-486. The Court refused to require the defendants to show "prejudice" in these circumstances and, relying on *Glasser*, expressly held that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." *Id.* at 488.[7]

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[7] Justice Powell's dissenting opinion took issue with the Court equating the trial court's failure to inquire with a finding of conflicting interests. 435 U.S. at 492-493. His dissent proposed following the rules developed in lower courts that required showing "some specific instance of prejudice, some real conflict of interest, resulting from a joint representation" before finding

Two years later, in *Cuyler v. Sullivan*, a federal habeas corpus case, the Court addressed the two issues expressly reserved in *Holloway*: "whether a state trial judge must inquire into the propriety of multiple representation even though no party lodges an objection," and "whether the mere possibility of a conflict of interest warrants the conclusion that the defendant was deprived of his right to counsel." 446 U.S. at 345. The Court in *Sullivan* decided that, "[a]bsent special circumstances," the Sixth Amendment does not require a trial court to initiate an inquiry into possible conflicts simply because of multiple representation. "Unless the trial court knows or reasonably should know that a *particular* conflict exists, the court need not initiate an inquiry." *Id.* at 346-347 (emphasis added).

Resolving the second question in *Sullivan* produced the Court's first explicit discussion of the concept of "actual conflict" as it now is used in the context of Sixth Amendment claims.[8] *Sullivan* held that "the possibility of

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a Sixth Amendment violation. *Id.* at 494 n.3, *quoting United States v. Carrigan*, 543 F.2d 1053, 1055-1056 (2d Cir. 1976). If a trial court failed to conduct an inquiry after a timely objection, the dissent recommended shifting the burden of proof on the issue of "prejudice" to the prosecution. *Id.* at 495.

[8] The words "actual conflict" appeared in *Holloway*, 435 U.S. at 481, describing the state court's rejection of the defendants' claim. *See Holloway v. State*, 539 S.W.2d 435, 439 (1976) (describing "majority rule" as requiring some "evidence of an actual conflict of interest or evidence pointing to a substantial possibility of a conflict of interest" before joint representation is reversible error). *Sullivan* noted that a "substantial majority" of the federal courts of appeals at that time required a defendant to establish a Sixth Amendment



conflict is insufficient to impugn a criminal conviction." *Id.* at 350. To distinguish clearly the "actual conflict" that would violate the Sixth Amendment from the "possible conflict" that would not, the Court purposefully and unambiguously coupled "conflict" and "effect."

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.

*Id.* at 348. The Court referred interchangeably to an "actual conflict of interest," *id.* at 348, n.14, "a conflict of

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violation by identifying an "actual conflict of interest," 446 U.S. 348 n.14, and the decisions cited also had defined "actual conflict" in terms of *affecting* the representation of counsel or prejudicing the defense. *See United States v. Lovano*, 420 F.2d 769, 773 (2d Cir.) ("some specific instance of prejudice, real conflict of interest, resulting from a joint representation must be shown to exist"), *cert. denied*, 397 U.S. 1071 (1970); *United States v. Atkinson*, 565 F.2d 1283, 1284-1285 (4th Cir. 1977) (adopting *Lovano*), *cert. denied*, 436 U.S. 944 (1978); *Foxworth v. Wainwright*, 516 F.2d 1072, 1077-1079 (5th Cir. 1975) (plausible defense foreclosed because of damage to co-defendants constituted actual substantial conflicts); *Thacker v. Bordenkircher*, 590 F.2d 640, 641-642 (6th Cir.) (defendants had consistent defenses and no actual conflict or prejudice), *cert. denied*, 442 U.S. 912 (1979); *United States v. Mandell*, 525 F.2d 671, 678 (7th Cir. 1975) ("There must be a showing of a conflict of interests based on the record and not on mere speculation"), *cert. denied*, 423 U.S. 1049 (1976); *United States v. Cox*, 580 F.2d 317, 323 (8th Cir. 1978) (possibility of another strategy was insufficient to establish actual conflict), *cert. denied*, 439 U.S. 1075 (1979); *United States v. Kutas*, 542 F.2d 527, 529 (9th Cir. 1976) (must show actual conflict prejudiced defense), *cert. denied*, 429 U.S. 1073 (1977); *Carrigan*, 543 F.2d at 1056 (in absence of inquiry by court, government bears burden on issue of prejudice).

interest [that] *actually affected* the adequacy of the representation," *id.* at 349 (emphasis added), and "actively represent[ing] conflicting interests." *Id.* at 350. Then, dispelling any doubt about the ruling, the definition of what constitutes an impermissible conflict was repeated in the closing paragraph: "In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 350.

Significantly, *Sullivan*'s requirement that the alleged conflict be "actual" in terms of having manifested itself in some "adverse effect" before it could state a valid Sixth Amendment claim, certainly was within the body of precedent governing conflict claims. The Court had rejected the idea that multiple representation was presumptively unconstitutional in both *Glasser* and *Holloway*. *Glasser* had stressed the failures of counsel that had resulted from counsel's desire to protect Kretske's interests and which revealed the "struggle to serve two masters." 315 U.S. at 75. In *Holloway*, the Court recognized that *Glasser* had found actual impairments in the lawyer's performance in concluding that conflicting interests had been shown, 435 U.S. at 482, and the Court divided specifically on the need for a finding that a conflict had "prejudiced" or "hampered" Holloway's defense. *Id.* at 492-493, 496 (Powell, J., dissenting).

In *Sullivan*, the Court acknowledged that the requirement of actual conflict adversely affecting the representation was different from *Holloway*'s "automatic reversal" rule because *Holloway* "did not consider whether the alleged conflict actually existed." *Sullivan*, 446 U.S. at 345. *Sullivan*, however, did not overrule *Holloway*. Instead, the



Court took great care to confine *Holloway*'s "automatic reversal" rule to the particular factual circumstance of denying a defendant who objects to counsel's representation the *opportunity* to prove a conflict:

> [A] defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. But *unless the trial court fails to afford such an opportunity*, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel.

*Id.* at 348 (emphasis added).

Removing all doubt concerning the scope of *Holloway*, the Court *repeated* its definitional distinction of *Holloway*, *see Sullivan*, 446 U.S. at 348, making clear that the *general* rule is the overarching Sixth Amendment standard of actual conflict adversely affecting counsel's performance and that an *exception* to this general rule exists only for a defendant who raises an objection at trial. Mickens thus misstates *Sullivan* when he asserts that the Court defined the Sixth Amendment violation in terms of whether a "judicial duty to initiate an inquiry arises." (Pet. Brief at 27). The Court certainly acknowledged the duty of a trial court to inquire when it "knows or reasonably should know that a particular conflict exists," but the Court could not have made it any plainer that the Sixth Amendment violation turned on showing that an actual conflict adversely affected counsel's performance. 446 U.S. at 348 *and* 350.

At the same time, *Sullivan* ended any dispute over whether "prejudice," in the harmless error sense, needed

to be proved or disproved. Prejudice is presumed, as both *Glasser* and *Holloway* intended, but only after the petitioner "shows that a conflict of interest actually affected the adequacy of his representation."[9] 446 U.S. at 349.

*Sullivan* did not attempt to define fully the distinctive "actual conflict" that "adversely affected" a lawyer's representation beyond illustrating what was evident in prior cases. The obvious "struggle to serve two masters" identified in *Glasser*, 315 U.S. at 75, had "impaired the defense." *Sullivan*, 446 U.S. at 439. In *Dukes v. Warden*, 406 U.S. 250, 256 (1972), no "lapse in representation" warranting relief was shown when Dukes' attorney also represented two codefendants who shifted blame for the crimes to Dukes after he pleaded guilty. *See Sullivan*, 446 U.S. at 349. These contrasting examples served to make *Sullivan*'s point: a possible or hypothetical conflict of interest is made concrete – *actual* – by evidence demonstrating that in fact it adversely affected counsel's

[9] "Prejudice" is not a one-size-fits-all concept, but is given different meanings in different contexts. In *Glasser* and *Holloway*, the Court discussed "prejudice" in rejecting consideration of "harmless error." The "prejudice" that *Sullivan* presumed "is not quite the *per se* rule of prejudice" that exists for the outright denial, or prevention of the assistance, of counsel. *Strickland*, 466 U.S. at 692; *United States v. Cronic*, 466 U.S. 648, 659 and n.25 (1984). Mickens' conflict claim is a defaulted claim which, as the district court properly found, independently requires a showing of "prejudice" – that the errors in his trial "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension." *United States v. Frady*, 456 U.S. 152, 170 (1982); *Murray v. Carrier*, 477 U.S. 478, 494 (1986).



representation. Like the sound of the proverbial tree falling in the forest, the actual conflict cannot be known to exist without its discernable imprint, its adverse effect.

One week after *Sullivan* was announced, the Court granted certiorari in *Wood* to decide the constitutionality of imprisoning probationers who had failed to make installment payments on fines. *See Wood v. Georgia*, 446 U.S. 951 (1980) (order granting certiorari); *Wood*, 450 U.S. at 264 (identifying certiorari issue). After oral argument, however, the Court identified factual circumstances which strongly suggested the possibility that the employer and the attorney representing the petitioners might have orchestrated the petitioners' predicament simply as a way to create a test case for the employer on the constitutional issue. If the attorney "was serving the employer's interest in setting a precedent," there was a "clear possibility of conflict of interest." *Id.* at 267-268. The state's attorney repeatedly had brought the potential for conflict to the attention of the trial court, but the judge conducted no inquiry into the issue. *Wood*, 450 U.S. at 265 n.5, 273. The Court remanded the case to determine if an "actual conflict" existed. *Id.* at 273-274. *Wood*, however, never suggested that the Court was adopting any different meaning of "actual conflict" than had been set out a year earlier in *Sullivan*.

Mickens now insists that *Wood*'s specific reference to "actual conflict" in its remand order, without an additional and equally specific reference to "adverse effect," should be taken to mean that the Court intentionally uncoupled *Sullivan*'s deliberate link of conflict and

effect.[10] Mickens sees *Wood* as announcing a new Sixth Amendment standard to fill in an imagined gap in the Court's jurisprudence. Mickens reads *Wood* to hold that: conflict claims arise in "three separate circumstances" and each circumstance requires its own rule; no rule previously had been announced for *Wood*'s circumstances which lay somewhere between *Holloway* and *Sullivan*; and subdividing the *Sullivan* rule would satisfy Mickens' need for an intermediate rule. (Pet. Brief at 29-35). Borrowing from the Fourth Circuit dissenters, Mickens concludes that *Wood* announced a rule he has fashioned for relief in his own case:

> A defendant establishes a Sixth Amendment violation when there is no objection to counsel's representation, but the trial judge knew or reasonably should have known about an apparent conflict and conducted no inquiry, and the defendant shows an "actual conflict" without regard to an "adverse effect."

(Pet. Brief at 30). (JA 328).

[10] The Fourth Circuit, like other courts of appeals, has approached the task of applying *Sullivan* by defining and examining "actual conflict" and "adverse effect" as distinct concepts, while recognizing that *Sullivan* requires linking the "conflict" and "effect." *See, e.g., United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991); *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985); *Lipson v. United States*, 233 F.3d 942, 946 (7th Cir. 2000); *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992); *United States v. Migliaccio*, 34 F.3d 1517, 1526 (10th Cir. 1994). "The two requirements, an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap." *Tatum*, 943 F.2d at 375. *See also Stoia v. United States*, 109 F.3d 392, 397 (7th Cir. 1997).



Of course, the new constitutional doctrine Mickens discerns has no history before *Wood*, was never discussed in *Wood*, and has not been suggested by this Court since *Wood*. The Court's opinion certainly does not support the remarkable supposition that *Wood* intended to introduce a new variation in Sixth Amendment jurisprudence without briefing, argument or even discussion, and to do so through the subtle mechanism of omitting the words "adverse effect" from the remand order. Certainly *Wood* cannot be read to have silently overruled *Sullivan*'s plain and recent statement that a Sixth Amendment violation requires a showing of an actual conflict *adversely affecting* the representation.[11] As the *en banc* Fourth Circuit

[11] Mickens' extended discussion of why the rule he advocates would be a good idea simply fails to recognize the fact that *Sullivan* necessarily rejected the idea of granting presumptive "adverse effect" to habeas petitioners in Mickens' circumstances. *Sullivan* has not been overruled and Mickens' federal habeas action is not the place for the Court to announce new rules of law. *See Saffle v. Parks*, 494 U.S. 484, 487 (1990) (Court will not announce or apply new rule on collateral review); *Teague v. Lane*, 489 U.S. 288 (1989). Mickens' accusation of bad faith on the part of trial counsel as a reason to dispense with showing an "adverse effect" (Pet. Brief at 33-34) is wholly unwarranted and, moreover, a poor basis upon which to fashion constitutional principles. Saunders represented Mickens vigorously through preliminary hearing, the trial, and two appeals in the Virginia Supreme Court, including successfully eliminating robbery and abduction charges before Mickens' 1993 trial and winning Mickens a new sentencing hearing in 1995. The district court's dissatisfaction with some of Saunders' decisions does not alter the fact that the District Judge who saw and heard the witnesses found no actual conflict of interest or adverse effect.

accurately observed, "*Wood*'s terse instruction to the trial court on remand cannot bear the constitutional weight Mickens ascribes to it." (JA 372).

Indeed, *Wood*'s only comment on Sixth Amendment conflict precedent was a single mention of *Sullivan* in footnote 18, responding to a dissenting opinion which had criticized the majority for using *Sullivan* to assume "jurisdiction over a claim otherwise beyond its reach."

> Justice White's dissent states that we have gone beyond the recent decision in *Cuyler v. Sullivan*. Yet nothing in that case rules out the raising of a conflict-of-interest problem that is apparent in the record. Moreover, *Sullivan* mandates a reversal when the trial court has failed to make an inquiry even though it "knows or reasonably should know that a particular conflict exists."

*Wood*, 450 U.S. at 272 n.18. (citation omitted).[12] From this reference, Mickens infers an intent to create a separate rule of "actual conflict" without *any* effect in a situation where the trial court was on notice of a particular conflict. The Court's reference to "reversal," however, must be understood as authorizing the action the Court took in that case. On direct review, this Court vacated the underlying judgment of revocation to permit a judicial inquiry to determine the existence of a conflict this Court found to be "strongly suggest[ed]." *Id*. at 273.

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[12] *Wood* was not a Sixth Amendment case. *Wood*, 450 U.S. at 273 ("we base our decision in this case on due process grounds"). The employees possessed a due process right to counsel for the probation revocation hearing, which also included a right to conflict-free counsel. *Id*. at 271.



The Court explained the "apparent conflict" it identified in *Wood* just as it had explained "actual conflict" in *Sullivan* – by reference to various "indications" of *adverse effects*: the employer's failure to pay the employees' fines, 450 U.S. at 267; the attorney's failure at the revocation hearing to "dwell on the apparent bad faith of his own employer," *id*. at 268, n.14; the lack of protest by trial counsel to the amounts of fines imposed on indigent employees, *id*. at 267-268; and the effort to conceal even the name of the employer. *Id*. at 269, n.16. On the appellate record, the Court was unable to resolve the conflict issue it had identified, but the Court's concern with these "indications" manifesting conflicting interests allowed no uncertainty about what the state court was commanded to do on remand.

Mickens focuses on the bare words of *Wood*'s remand order yet overlooks the fact that the Court already had described the circumstances that would constitute a violation of the right to counsel in that case. If the differing goals of employer and employee disabled counsel from "pursu[ing] petitioners' interests single-mindedly," *id*. at 271-272, and if "counsel *was influenced in his basic strategic decisions by the interests of the employer who hired him*," *id*. at 272 (emphasis added), "the due process rights [to counsel] of petitioners were not respected at the revocation hearing, or at earlier stages of the proceedings below." *Id*. By focusing the inquiry on the *influence on counsel's representation*, *Wood* undeniably applied *Sullivan*'s requirement of an actual conflict adversely

affecting the representation.[13] The Fourth Circuit thus correctly ruled that the Court's reference to "actual conflict" in these circumstances necessarily also included the "adverse effect" inquiry.

This Court consistently has maintained *Sullivan*'s standard of actual conflict adversely affecting a lawyer's representation. *See, e.g., Strickland*, 466 U.S. at 692 (prejudice presumed only if defendant "demonstrates that counsel actively represented conflicting interests," and "an actual conflict of interest adversely affected his lawyer's performance"); *United States v. Cronic*, 466 U.S. at 661 n.28 (citing *Sullivan*, ineffectiveness presumed when counsel "actually represented conflicting interests"); *Smith v. Robbins*, 528 U.S. 259, 287 (2000) ("prejudice is presumed when counsel is burdened by an actual conflict of interest, although in such a case we do require the defendant to show that the conflict adversely affected his counsel's performance.").

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[13] It is possible to read *Wood* as implicitly finding an "actual conflict," as that term now often is defined, *i.e.*, one attorney actively representing the diverging interests of several clients, because the lawyer in *Wood* actively represented multiple clients and the Court identified potential areas where the parties' interests diverged. It also may be possible to read *Wood* as necessarily including an implied finding of "adverse effect" because the Court found ways that petitioners' lawyer's performance may have been "impaired." But the Court's instruction to the state court concerning the showing that would establish a violation of the right to counsel, was "whether counsel was influenced in his basic strategic decisions by the employer who hired him." This instruction linked the concepts of conflict and effect, just as *Sullivan* had contemplated.



In *Burger v. Kemp*, 483 U.S. 776 (1987), the Court expressly reaffirmed *Sullivan*'s linkage of "actual conflict" and "adverse effect" in the context of an alleged conflict from law partners representing codefendants in separate trials. The Court upheld the district court's findings that petitioner's attorney had not actively represented competing interests, *id.* at 783, and that petitioner had not demonstrated that an actual conflict adversely affected counsel's performance. *Id.* at 785. The inextricable linkage of conflict and effect is clear in the Court's decision: petitioner's alleged "actual conflict" was based on counsel's strategic decisions in the handling of his appeal. *Id.* at 784. The district court's finding that the lawyer had not been motivated by his partner's representation demonstrated that the possible conflicting interest had not affected his performance and no "actual conflict" existed. *Id.* at 784-785.

It is not mere chance that this Court's Sixth Amendment conflict of interest decisions in direct appeal cases look first to the issue of trial court error and that *Sullivan*, a habeas case, looks to the effect of the alleged actual conflicts. Review for trial court error, and actions taken to address such error as occurred in *Wood*, are essential appellate functions. *Sullivan* contemplates the possibility that trial court error in failing to inquire into possible conflict situations may go unnoticed until collateral proceedings, and concludes that it is not inappropriate to require the habeas petitioner to make the showing required by *Sullivan* to establish a Sixth Amendment violation before vacating a presumptively valid state court final judgment. "It has, of course, long been settled law that an error that may justify reversal on direct appeal

will not necessarily support a collateral attack on a final judgment." *Frady*, 456 U.S. at 165, *quoting*, *United States v. Addonizio*, 442 U.S. 178, 184 (1979). The Sixth Amendment's purpose in assuring fairness in the adversary criminal process, *Wheat v. United States*, 486 U.S. 153, 158 (1988), *Strickland*, 466 U.S. at 691-692, is preserved fully by the *Sullivan* rule.

## II. THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY APPLIED *SULLIVAN* IN REJECTING MICKENS' CLAIMS.

Mickens' argument in favor of finding a constitutional conflict of interest relies heavily on the immediate visceral impact of learning that a lawyer previously represented the victim of his current client.[14] This Court consistently has refused, however, to create categories of legal representations which would constitute per se conflicting interests prohibited by the Sixth Amendment and,

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[14] The factual circumstances presented by this case are by no means unique. *See, e.g., Crisp v. Duckworth*, 743 F.2d 580, 588 (7th Cir. 1984) (finding no conflict where defense counsel previously represented murder victim in unrelated criminal action), *cert. denied*, 469 U.S. 1226 (1985); *Kirkpatrick v. Butler*, 870 F.2d 276, 284 (5th Cir. 1989) (finding no conflict based on defense counsel's friendship with, and prior representation of, members of murder victim's family), *cert. denied*, 493 U.S. 1051 (1990); *Mosley v. Scully*, 908 F. Supp. 1120 (E.D. N.Y. 1995) (finding no actual conflict where counsel previously represented murder victim on unrelated charges); *Dixson v. Quarles*, 627 F. Supp. 50 (E.D. Mich.) (no actual conflict where defense counsel previously represented murder victim), *aff'd*, 781 F.3d 534 (6th Cir. 1985), *cert. denied*, 479 U.S. 935 (1986).



as discussed, *Sullivan* requires the showing of an actual conflict of interest adversely affecting counsel's performance.

Mickens relies on the particular instances of "actual conflict" found only by the two judges of the Fourth Circuit *panel* majority, but his argument primarily stresses the single claim that Saunders obtained confidential information about Hall's background which he could not use in Mickens' defense or to rebut family victim-impact testimony.[15] (Pet.

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[15] Judge Michael's opinion for the panel majority identified an "actual conflict" in the following ways: (1) Saunders possessed a residual duty to maintain Tim Hall's secrets and confidences even after the representation ended which allegedly conflicted with Mickens' interest in his lawyer pursuing a reasonable pre-trial investigation, including an investigation of Hall's character and background; (2) a member of Hall's family might offer "victim impact" testimony at sentencing, but Saunders' duty to preserve Hall's confidences prevented him from investigating the victim's relationships with his family; and (3) Saunders' failure to reveal the prior Hall representation to Mickens and the trial court constituted an ethical breach and Saunders' supposed personal interest in concealing his ethical lapse conflicted with Mickens' interest in conflict-free representation.

Concerning the last item, Mickens merely adopts the panel majority's theory of an "actual conflict" based on Saunders' alleged "ethical conflict" without separately arguing the point. The district court's specific and unchallenged factual findings, however, directly refuted the basic factual assertions underlying the theory because the district court found that Saunders never recognized any conflicting interests and never developed any personal interest in concealing the previous Hall representation. (JA 290-291, 304-305). The *en banc* Fourth Circuit correctly upheld the district court's findings that Saunders had not concealed his previous representation of Hall out of "a conflicting personal interest in remaining assigned to the case." (JA 376).

Brief at 46). According to Mickens, Saunders' duty to maintain Hall's confidences adversely affected his representation because evidence existed that could have been considered in formulating defense strategies based on "consent" or "negative information" about the victim. He argues that Saunders was prohibited ethically from making choices whether or not to investigate Hall's background and that this demonstrates sufficient impairment of the representation to constitute an "adverse effect."[16] (Pet. Brief at 47). Even assuming that Saunders ethically was prohibited from revealing or acting on the limited "confidential" information he received from his brief representation of Hall, *see Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (duty to preserve confidences continues after the death of the client), Mickens never has demonstrated that Saunders and Keeling failed to make reasonable investigations, much less that they failed as a

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[16] The Sixth Amendment standard clearly is not defined by ethical rules that govern attorneys' professional conduct. *See Nix v. Whiteside*, 475 U.S. 157, 165 (1986) ("[B]reach of an ethical duty does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel"); *Strickland*, 466 U.S. at 668 (norms of practice are guides only). Ethical rules necessarily are forward-looking, meant to anticipate potential conflicts in advance. The prospective nature of such rules makes them helpful for a trial court's discretionary decision to disqualify counsel and avoid even potential conflicts, *see Wheat*, 486 U.S. at 160-161, but less useful in the retrospective assessment of harmful impact on counsel's representation. Thus, the Court should decline the invitation of petitioner's amici to abandon its precedents and delegate to the drafters of rules of professional conduct the authority to determine the reach of the Sixth Amendment.



result of Saunders' previous unrelated representation of Hall.

### A. Saunders' Successive Representation Presented a Reduced Risk of "Actual Conflict."

The claims of a conflict of interest here involve only a successive representation. Saunders was appointed to represent Hall for juvenile court charges and that *representation* indisputably ended when the charges were dismissed. At that point in time, Saunders no longer had any ability to take any action for or against Hall's interests in that representation. Saunders never simultaneously *represented* Hall and Mickens. *See Burger*, 483 U.S. at 783 (any "overlap of counsel" from law partners representing codefendants "did not so infect [defense counsel's] representation as to constitute an active representation of competing interests"); *Mackall v. Commonwealth*, 372 S.E.2d 759, 765 (Va. 1988) (defendant's attorney previously represented prosecution witness for an unrelated matter; no conflict or effect because co-counsel cross-examined witness), *cert. denied*, 492 U.S. 925 (1989).

The opportunities for conflicting interests to arise in a successive representation of individuals who are not codefendants or charged with factually related offenses are far more limited than the risks associated with multiple representation of codefendants in one trial, *see, e.g., Glasser, Holloway*, and *Sullivan*, or the multiple representation of codefendants in separate trials, as in *Dukes* and *Burger*, or even *Wood*'s circumstances of an attorney representing the interests of a third party who is not charged

with an offense but is paying for, and perhaps controlling, the on-going representation of other defendants.[17] The absence of a concurrent representation simply reduces the opportunity for friction between conflicting interests.

### B. Mickens Failed to Show That an Actual Conflict Adversely Affected Saunders' Performance.

The district court and Fourth Circuit rejected Mickens' claims of "adverse effect" because petitioner failed to identify plausible and viable alternative defense strategies available to Mickens that Saunders was prevented from pursuing. (JA 376-377).[18] The district court

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[17] The risks of shifting blame among codefendants, inconsistent defenses, and accounting for the relative strength or weakness of evidence against codefendants are not presented in Mickens' case and several circuit courts of appeal have recognized that an actual conflict of interest is less likely to arise in the circumstances of unrelated successive representations. *See United States v. Gambino*, 864 F.2d 1064, 1070 (3d Cir. 1988), *cert. denied*, 492 U.S. 906 (1989); *Mannhalt v. Reed*, 847 F.2d 576, 580 (9th Cir.), *cert. denied*, 488 U.S. 908 (1988); *Smith v. White*, 815 F.2d 1401, 1405 (11th Cir.), *cert. denied*, 484 U.S. 863 (1987); *Fahey*, 769 F.2d at 834.

[18] As Mickens acknowledges, the courts of appeals have adopted approaches to conflict claims after *Sullivan* that necessarily blend the actual conflict and adverse effect inquiry and, like the Fourth Circuit, require proof of alternative defense strategies that may have been obstructed by conflicting interests. (Pet. Brief at 37-38, n.57). *See Fahey*, 769 F.2d at 836 (defining "actual conflict" in terms of a showing of a "plausible alternative defense strategy or tactic" that has "sufficient substance to be a viable alternative," but is "inherently in conflict" with other interests or "not undertaken due to the



conducted a thorough evidentiary hearing and made specific factual findings and credibility determinations fully supported by the evidence. The *en banc* Fourth Circuit unambiguously upheld the district court's findings of fact in ruling that no "adverse effect" had been shown. (JA 372-377). Mickens cannot substitute speculation for "these heavily fact-based rulings," *see Burger*, 483 U.S. at 785, and the district court's findings of fact concerning Mickens' allegations of an "actual conflict" cannot be ignored, or "assumed" away, because Mickens finds them inconvenient to his theory of the case. They are binding on this Court and may be set aside only if "clearly

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attorney's other loyalties or interests"); *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993) (adopting *Fahey* alternative strategy/ "actual conflict" formulation to test "adverse effect"), *cert. denied*, 511 U.S. 1022 (1994); *Gambino*, 864 F.2d at 1070-1071 ("Clearly, a defendant who establishes that his attorney rejected a plausible defense because it conflicted with the interests of another client establishes not only an actual conflict but the adverse effects of it."); *Perrillo v. Johnson*, 79 F.3d 441, 449 (5th Cir. 1996) (adopting alternative defense standard for "adverse effect"); *United States v. Mays*, 77 F.3d 906, 908 (6th Cir. 1996) (conflict shown by instances in the record where attorney chose between alternative courses of action); *Stoia*, 109 F.3d at 395 (conflict has "adverse effect" if "there is a reasonable likelihood that counsel's performance somehow would have been different"); *Miskinis*, 966 F.2d at 1268 (effect on performance "likely"); *Migliaccio*, 34 F.3d at 1526 ("adverse effect" if "seemingly valid or genuine alternative strategy" conflicted with other interests); *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir.) ("adverse effect" shown if plausible and reasonable strategy not pursued because linked to conflict), *cert. denied*, 528 U.S. 817 (1999).

erroneous."[19] F. R. Civ. P. Rule 52(a). *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

### 1. Consent Defense

Mickens' theory of "consent" is based on several observations he makes concerning the crime scene, the condition of Hall's body, and a newspaper article which contained speculation that Hall might have been a homosexual prostitute and a description of the riverside location as a hang-out for vagrants, winos, street people, drug addicts, prostitutes and runaways.[20] (JA 397-398).

[19] Mickens' repeated complaint that it is not appropriate to rely on the "record" created by "conflicted" counsel cannot circumvent the district judge's findings. Mickens cannot merely state that he has shown a conflict and then attack the record, especially in the face of district court findings to the contrary. More significantly, the "record" relied upon by the district court is not limited to the trial record. It also includes the federal evidentiary hearing where Mickens had the opportunity to develop facts in support of his allegations, but failed to do so.

[20] As the district court set them out, "Mickens points to the following facts that made consent a plausible defense strategy: (a) there were no 'defensive' stab wounds; (b) there was no evidence that Hall was forced to the secluded area where he was found; (c) there were rumors that Hall was a male prostitute and that the area where Hall's body was found was a known gathering place for homosexuals; (d) there was no blood mixed with Mickens' semen stain on the mattress; and, (e) the mattress where Hall's body was found had been used for sexual activity in the past." (JA 292-293). Mickens argues that Hall must have accompanied his killer voluntarily to the river in order to engage in consensual sex because the only access to the location was down a steep embankment and the killer could not have forced Hall down a precarious hill. In addition to the obvious point that an armed assailant probably could have forced Hall



Mickens postulates the following outlandish scenario: Hall voluntarily accompanied someone to the isolated location (Pet. Brief at 9-10) to have "consensual sex" (*id.* at 45) which "ended unsatisfyingly," then "something . . . happened" (*id.* at 49 n.74) – "assaultive behavior, sexual mockery, or other forms of discreditable activity by Hall" (*id.* at 14 n.28) – that "incited [someone] to homicidal fury." (*Id.* at 49 n.74). Someone then choked Hall and "straddl[ed] Hall's body," "pinioning Hall while stabbing him." (*Id.*).[21]

Although the district court granted Mickens an evidentiary hearing, Mickens failed to show that any witness, or other competent and admissible evidence, ever had existed to prove the supposed "prostitution."[22] (JA

down the bank, the testimony at the evidentiary hearing and a diagram of the area demonstrate conclusively that the murder location was easily assessable by way of a set of stairs leading down to the river and only one block from Hall's apartment and the murder scene. (JA 8, 428).

[21] The evidence established that sodomy, and more specifically anal sodomy, undoubtedly was the goal of Hall's assailant: Hall's body was face down; his trousers and underwear removed and cast aside; his legs spread apart; a lubricant found on Hall's buttocks near his anus; and, pubic hairs with roots, suggesting that they had been removed by rubbing or other friction, found on Hall's buttocks. Bloody transfer stains on the outside of Hall's thighs indicated that the stabbing occurred before or during the sexual assault. The absence of any injury to the boy's anus contradicts any suggestion that the act intended ever was completed.

[22] Trial counsel could not rely on rumors, much less hearsay reports of rumors in newspaper articles, to establish Hall's supposed "reputation." *See* Va. Code § 18.2-67.7. *See also Hoke v. Commonwealth*, 377 S.E.2d 595, 599 (Va. 1989) ("rape

295, 303). Hall's juvenile charges did "not suggest that he was a prostitute, much less that he consented to have sex with Mickens" (JA 288), and Saunders' representation of Hall simply was not related to Mickens' charges or a consent defense. (JA 289, 291). The district court found that the information available to counsel "foreclosed presentation of consent as a plausible defense." (JA 293). Saunders knew from police reports that Hall occasionally visited the riverside; Hall's neck was bruised by a choke hold; the bloody transfer stains on the back of his thighs put the stabbing before or during a sexual assault; Hall was stabbed 143 times from behind; and, "most importantly," Mickens claimed that he did not kill or even know Hall.[23] (JA 293). Both attorneys testified without reservation that in the absence of the defendant's

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shield" statute bars "evidence of general reputation or opinion of the unchaste character of the complaining witness in all circumstances"), *cert. denied*, 491 U.S. 910 (1989); *Winfield v. Commonwealth*, 301 S.E.2d 15, 20-21 (Va. 1983) (statute reversed common law rule permitting opinion reputation evidence which "has very little probative weight"; evidence showing rape victim had reputation of prostitution based on specific acts with third parties was inadmissible at common law and under statute).

[23] Mickens cannot avoid his own testimony by hinting that "unconflicted" counsel might have persuaded him to testify differently. Saunders and Keeling reasonably relied on Mickens' denials in formulating his defense, *see Strickland*, 466 U.S. at 691, and Mickens should not be heard to suggest that counsel should have advocated that Mickens perjure himself. In any event, Mickens never testified in the federal hearing, and there is no factual basis to indicate his versions of events ever would change.



testimony consent simply was not a plausible or viable defense. (JA 165, 182, 211-212, 245).[24]

Inexplicably, Mickens fails even to mention that independent co-counsel, Warren Keeling, had investigated the rumors about Hall that were reported in the paper. (JA 173-175). Keeling took the lead at sentencing and investigated the case independently of Saunders. Specifically, Keeling spoke to Bernard Gordon, went to the Towers neighborhood on several occasions, and spoke to others about Hall, but was unable to confirm rumors of Hall's "prostitution." (JA 173-175, 176). Thus, with respect to the claim of failure to investigate Hall, *Saunders'* prior representation is irrelevant because Keeling independently investigated the case, and Mickens never has alleged that Keeling possessed any conflicting interests. (JA 161, 172-173, 183, 227). The district judge saw and heard the witnesses testify and found that "Saunders discarded consent as a strategy not because of any loyalty to Hall,

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[24] The defense of consent must be advanced by evidence. *Smith v. Commonwealth*, 248 S.E.2d 135, 142 (Va. 1978), *cert. denied*, 441 U.S. 967 (1979). In *Smith*, the defendant's own confession contained information similar to Mickens' "facts": Smith met his victim on an isolated beach and engaged her in friendly conversation as she accompanied him to a wooded area, and there were no defensive wounds. *Id.* at 142. Smith, however, had not claimed that intercourse was consensual. *Id.* This evidence was found insufficient as a matter of law to present a defense of consent. *Id.* Of course, this Court has recognized that murder is "a fate more frequent among rape victims than friendly sex partners." *Calderon v. Thompson*, 523 U.S. 538, 561 (1988) (citation omitted).

but because neither the facts nor Mickens' testimony was compatible with such a strategy."[25]

(JA 294). The Fourth Circuit correctly upheld the district court's fact-intensive finding that consent was not a viable defense strategy. (JA 374-375).

**2. Negative Information**

Mickens also argues that Saunders' inability to use confidential information about Hall's juvenile charges resulted in Saunders' failure to investigate Hall's background to develop "negative information" about his victim and his relationships with his family as part of his sentencing defense. Again he relies on the unsubstantiated rumors after Hall's murder suggesting homosexual activities. He also relies on Hall's "criminal record," consisting entirely of the two dismissed juvenile charges, but such record likely was not admissible and "had no utility

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[25] The district court's findings concerning Saunders' credibility cannot be avoided on the basis of Mickens' dubious argument that the courts below erroneously applied a "subjective" test in finding no "adverse effect," or relied on counsel's "motivation" rather than an "objective" analysis. In *Burger*, this Court upheld the district court's findings crediting trial counsel's testimony as the basis for its conclusion that no "actual conflict" had been established. 483 U.S. at 785. *Burger* teaches that it would be "most inappropriate, and factually unsupportable" to speculate that Saunders' representation of Mickens was "tainted by . . . improper motivation" in the face of the district court's "heavily fact-based rulings." *Id.* Moreover, the district court's findings concerning the plausibility of alternative strategies are based entirely on an objective assessment of the record.



as an alternative strategy." (JA 295). Moreover, the district court and the *en banc* Fourth Circuit both correctly rejected finding a plausible or viable strategy in using the information of Hall's assault charge to "impeach" Hall's mother's 1996 victim impact statement because it was "fraught with risk" (JA 297), and "choosing not to vilify the mother of the victim cannot be the mark of incompetent counsel by any measure." (JA 375).[26]

Saunders' duty to maintain Hall's confidences never prevented Keeling, who was the attorney responsible for sentencing, from considering negative information about Hall. The district court found that Keeling had the same information from public sources that Saunders learned while representing Hall, and Keeling believed it insufficient to support any defense.[27] (JA 296).

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[26] Mickens' "attack-the-victim's-mother" strategy can be hypothesized only in hindsight. The Virginia Supreme Court did not approve the admission of "victim impact" evidence in a Virginia trial until November 1994, well after Mickens' original trial. *See Weeks v. Commonwealth*, 450 S.E.2d 379, 389 (Va. 1994), *cert. denied*, 516 U.S. 829 (1995). Of course, the Commonwealth did not present any "victim impact" evidence during the first sentencing in 1993, and only the written statement required by the intervening change in state law was presented in the final judge sentencing in 1996. Juvenile Court Judge Foster cannot be charged with notice of a "particular conflict" based on her failure to have predicted that the Virginia General Assembly would enact legislation allowing the limited use of victim impact statements. *See* 1993 Va. Acts of the Gen. Assembly, c. 978.

[27] The newspaper article Mickens has relied upon recited that Hall had been charged with assaulting his mother; the police had "picked him up" for carrying a concealed weapon; he had been kicked out of his mother's house; and he had a social worker. (JA 397-398).

Even assuming as an abstract matter that "attacking the victim" in a murder prosecution ever can be a plausible and viable sentencing defense, it was inconsistent with Mickens' own testimony denying fault and asserting regret at the death of Hall. (JA 295). Such a strategy would turn on persuading the sentencing jury that a life sentence was more appropriate because Mickens chose as his victim a teenage boy who might have had some difficulties in his relationship with his mother and who had been charged with carrying a concealed bread knife in his car. The same jury would know that Mickens had committed several forcible sodomies, including one in prison, and, beyond a reasonable doubt, had brutally attacked and stabbed Hall 143 times. It is virtually unthinkable that any competent attorney would have *continued* to "attack the victim" in the courtroom, and the "propensity of that approach to backfire" made it an implausible sentencing strategy here. (JA 295).

### 3. Unrelated "Deficient" Investigation

In the district court, Mickens raised several allegations concerning the adequacy of Saunders' investigations into matters that had no connection to his previous representation of Hall. For example, Mickens alleged that Saunders failed to investigate information he had obtained from police reports suggesting the existence of an "alternative perpetrator." The district court correctly found that Saunders' failure to investigate these leads was not "inherently in conflict with" the previous representation of Hall or otherwise related to the alleged



conflict (JA 299-303), and the Fourth Circuit agreed. (JA 376-377).

*Sullivan* obviously requires that the alleged adverse effects in fact be the *effects* of the alleged conflict. In rejecting Mickens' "inadequate investigation" claims as unrelated to any conflicting interest, the Fourth Circuit simply followed *Sullivan*'s command that a Sixth Amendment violation requires showing that an actual conflict *adversely affected* the representation. After all, the whole point of *Sullivan* is to distinguish the category of "actual conflicts" that violates the Sixth Amendment from the mass of potential and abstract conflicts which do not.

Mickens' case demonstrates the wisdom of the *Sullivan* rule. After a full hearing, the courts below agreed that Saunders' potential conflict of interest had no adverse effect on Mickens' defense and that Mickens had received a fair trial. (JA 309-310, 379). The absence of any impairment of the defense only underscores the necessity for *Sullivan*'s standard in collateral challenges to presumptively valid state court judgments.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed and the stay of execution vacated.

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IN THE

# Supreme Court of the United States

WALTER MICKENS, JR.,
*Petitioner,*

v.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

The briefs of Virginia, the United States, and the Criminal Justice Legal Foundation all take the same basic tack and founder on the same shoal. They ask this Court to disregard the square holding of *Wood v. Georgia*, 450 U.S. 261 (1981), on the grounds that it was ill-considered, facile, written in shorthand, or too sloppily crafted to be taken at face value, as meaning what its explicit language says. They sugar-coat this effort to read *Wood* off the books by urging that if *Wood* means what it says, it overrules or modifies or incorrectly describes the rule of *Cuyler v. Sullivan,* 446 U.S. 335 (1980).

In so doing, all three briefs conspicuously fail to account for the prominent "Unless" Clause in the *Sullivan* opinion itself—the clause that anticipated the holding in *Wood* and was quoted in *Wood* because it speaks expressly to the situation in *Wood* (and in *Mickens)* where the presiding judge "knows or reasonably should know that a particular conflict exists" but fails to inquire into it. *Sullivan*, 446 U.S. at 347, quoted in *Wood*, 450 U.S. at 272 n.18. Virginia's brief tries to squeeze around *Sullivan*'s Unless Clause by emphasizing "*particular*" —which gets it nowhere at all because the nature of the *particular* conflict afflicting defense counsel in *Wood* and in *Mickens* was glaringly evident to the judges who, in each case, did not pause to inquire into it. Brief for Respondent at 22. CJLF's brief tries a different route around the Unless Clause, saying that it has to do only with the judicial duty of inquiry and not with the consequences of a failure to inquire—reading Parts IV(A) and IV(B) of the *Sullivan* opinion as two separate, logically unconnected and incommensurable opinions. Brief for CJLF at 15-16. The United States simply recites the Unless Clause in its description of the *Sullivan* opinion and thereafter turns a blind eye to it, leaving it unexplained, meaningless and completely inconsistent with its own one-eyed reading of *Sullivan* and this Court's Sixth Amendment rules. Brief of United States at 15.

Having obliterated—by blinking or prestidigitation—the crucial distinction drawn in *Sullivan* and again in *Wood* between cases in which the judge is on notice of defense counsel's potential conflict of interests and cases in which s/he is not, Virginia and its supporting *amici* proceed to make much of *Burger v. Kemp,* 483 U.S. 776 (1987), and *Burden v. Zant,* 498 U.S. 433 (1991), and 510 U.S. 132 (1994), without noting that these cases are in the latter category. Speaking, as they do, to situations in which it is **not** the case that the judge "knows or reasonably should know that a particular conflict exists," they present unremarkable applications of *Sullivan* and add nothing to the teachings of *Sullivan* relevant to Walter Mickens's case.

No legally competent reading of *Sullivan* and *Wood* can justify denying Mickens relief for an egregious violation of his Sixth Amendment right to be represented by conflict-free counsel.

## CONCLUSION

The decision below denying Walter Mickens, Jr. post-conviction relief should be reversed.

Respectfully submitted,

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No. 00-9285

# In the Supreme Court of the United States

WALTER MICKENS, JR., PETITIONER

*v.*

JOHN TAYLOR, WARDEN

(CAPITAL CASE)

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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## QUESTION PRESENTED

The Court granted certiorari limited to the following question:

"Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?".

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# In the Supreme Court of the United States

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WALTER MICKENS, JR., PETITIONER

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JOHN TAYLOR, WARDEN
(CAPITAL CASE)

*ON WRIT OF CERTIORARI*
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*FOR THE FOURTH CIRCUIT*

**BRIEF FOR THE UNITED STATES**
**AS AMICUS CURIAE SUPPORTING RESPONDENT**

## INTEREST OF THE UNITED STATES

The United States has a substantial interest in the resolution of the question on which the Court granted certiorari. Claims of ineffective assistance of counsel are frequently asserted under the Sixth Amendment on collateral review in federal criminal cases. Although this case involves a state prisoner seeking relief under 28 U.S.C. 2254, the Court's decision likely will affect ineffective-assistance claims brought by federal prisoners under 28 U.S.C. 2255 as well.

## STATEMENT

1. In March 1992, Timothy Hall's body was discovered beneath an abandoned construction site along the James

River in Newport News, Virginia. It was covered with stab wounds and was naked from the waist down with the legs splayed. There were bloody "transfer" stains on the outside of Hall's thighs and other signs of an attempted sodomy. The medical examiner concluded that Hall had bled to death from 143 separate "sharp force injuries," and that Hall could have survived in a conscious state for as long as 30 to 45 minutes after the last wound was inflicted. Extensive evidence tied petitioner to Hall's death, including incriminating statements made by petitioner to police shortly after his arrest, petitioner's confession to a cellmate to the murder and attempted sodomy of Hall, analyses of DNA and pubic hairs found on Hall, eyewitness testimony placing petitioner at the scene of the crime, and the fact that petitioner sold a pair of athletic shoes belonging to Hall to another individual just days after Hall's death. Pet. App. 5-6.

In 1993, a Virginia jury found petitioner guilty of the capital murder of Hall under a state law making premeditated murder during or following the commission of attempted forcible sodomy a capital offense. Va. Code Ann. § 18.2-31(5) (Michie 1996). The jury further found that Hall's murder was outrageously and wantonly vile, and sentenced petitioner to death. Pet. App. 6. On direct appeal, petitioner's sentence was vacated by this Court for reconsideration in light of *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), and the case was remanded for resentencing. 513 U.S. 922 (1994). Following a new sentencing hearing during which a *Simmons* instruction on parole ineligibility was made, a jury again sentenced petitioner to death. That sentence was affirmed on appeal and petitioner's application for state habeas corpus relief was denied. Pet. App. 6-7.

2. a. In June 1998, petitioner applied for a writ of federal habeas corpus under 28 U.S.C. 2254 in the United States District Court for the Eastern District of Virginia, claiming, *inter alia*, that he was denied effective assistance of counsel



in violation of the Sixth Amendment because his court-appointed counsel labored under a conflict of interest at trial. While investigating the case, petitioner's federal habeas counsel had reviewed Hall's juvenile court file and discovered that petitioner's trial counsel, Bryan Saunders, was representing Hall on assault and concealed weapon charges at the time of Hall's death. Judge Paul Criver of the local juvenile court had appointed Saunders to represent Hall on those charges on March 20, 1992. Sometime between March 20 and March 28, 1992, when Hall was last seen alive, Saunders met with Hall for 15 to 30 minutes. Pet. App. 7.

On April 3, 1992, Judge Aundria Foster of the juvenile court dismissed the charges against Hall, noting on the docket sheet that Hall was deceased. The docket sheet was one-page long and listed Saunders as Hall's counsel. Saunders learned of the dismissal that day. Pet. App. 7. The following day, petitioner was arrested for the murder and attempted forcible sodomy of Hall. On April 6, Judge Foster appointed Saunders and Warren Keeling to represent petitioner on those charges. Saunders handled the guilt phase of petitioner's trial, while Keeling handled the sentencing phase. Neither Saunders nor Keeling represented petitioner in the state habeas proceeding. Saunders did not disclose his prior representation of Hall to the court, his co-counsel, or petitioner, who did not learn about the representation until it was discovered by his federal habeas attorney upon reviewing Hall's juvenile file. *Id.* at 8.

b. In November 1999, after conducting an evidentiary hearing, the district court denied petitioner's federal habeas petition. Pet. App. 47-80. The court rejected petitioner's Sixth Amendment claim, holding that petitioner failed to establish "an actual conflict of interest [that] adversely affected his lawyer's performance." *Id.* at 65 (quoting *Cuyler*

v. *Sullivan*, 446 U.S. 335, 350 (1980)); see *id.* at 79.[1] The court found that petitioner "failed to demonstrate a correlation * * * between Saunders' representation of Hall for assault and possession of a concealed weapon and his representation of [petitioner] on attempted forcible sodomy and capital murder charges," *id.* at 68; "Saunders did not learn any confidential information from Hall that was relevant to [petitioner's] defense," *id.* at 69; and "Saunders did not believe that any 'continuing duties to a former client might interfere with his consideration of all facts and options for his current client,'" *ibid.* (internal brackets omitted). The court further found that there was no evidence that any conflict that might have existed because of Saunders' prior representation of Hall adversely affected Saunders' representation of petitioner. See *id.* at 70-76.

The district court also rejected petitioner's related argument, based on *Wood* v. *Georgia*, 450 U.S. 261 (1981), that his conviction should be reversed simply because Judge Foster declined to inquire into the potential conflict on Saunders'

[1] Because petitioner did not present his Sixth Amendment conflict-of-interest claim to the state courts, the district court explained that petitioner could raise that claim on federal habeas only if he established both "cause and prejudice." Pet. App. 63. The court found cause for not raising the claim earlier based on the fact that neither petitioner nor his state habeas counsel had any reason "to even consider the possibility that a conflict existed." *Id.* at 64. The court next reasoned that "[w]here the defaulted claim involves an actual conflict of interest on the part of counsel, the prejudice inquiry incorporates the test for establishing the underlying [Sixth Amendment] claim." *Id.* at 65. The court of appeals followed the same approach in considering whether it was appropriate to entertain petitioner's Sixth Amendment claim. See *id.* at 9-10. Because it is not within the question framed by this Court (see 121 S. Ct. 1651 (2001)), and because the judgment may be affirmed based on the ground relied upon by the court of appeals below, we do not address whether the courts below properly collapsed the prejudice inquiry into their analysis of the merits of the underlying Sixth Amendment claim.



part. Pet. App. 77. The court agreed with petitioner that "the record before Judge Foster presented special circumstances of an apparent possible conflict which required judicial inquiry." *Ibid.* But relying on this Court's decisions in *Wood* and *Sullivan*, the district court held that a trial court's "failure to inquire into a possible conflict does not [in itself] require reversal." *Id.* at 78. Instead, the court concluded, a defendant must show both an actual conflict and an adverse effect on the representation to establish a Sixth Amendment violation. See *id.* at 65, 79.

3. a. A divided panel of the Fourth Circuit reversed. Pet. App. 25-46. Then the court of appeals granted rehearing en banc, vacated the initial panel decision, and by a 7-3 decision affirmed the denial of habeas relief. *Id.* at 1-24. The en banc court assumed for purposes of its analysis "that Judge Foster * * * reasonably should have known that Saunders labored under a potential conflict of interest arising from his previous representation of Hall." *Id.* at 10. But the court rejected petitioner's argument that that judicial lapse alone "mandates automatic reversal of his conviction." *Ibid.*

The en banc court recognized that in *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), this Court held that automatic reversal of a conviction is required under the Sixth Amendment when a trial court fails to inquire into a potential conflict "in the face of repeated representations" by defense counsel that he is burdened by a conflict. Pet. App. 11. The court held, however, that *Holloway*'s automatic-reversal rule does not govern where, as here, defense counsel does not object to any conflict at trial. *Ibid.* In that context, the court reasoned, the rule of *Cuyler* v. *Sullivan* controls. "[A] defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Ibid.* (quoting 446 U.S. at 348).

The en banc court rejected petitioner's argument "that a footnote in *Wood v. Georgia* changed the rule of *Sullivan* and

extended the automatic reversal rule of *Holloway* to circumstances in which a trial court ignores a conflict about which it reasonably should have known." Pet. App. 11-12. The court further rejected petitioner's alternative argument that, "even if *Wood* does not compel automatic reversal of his conviction, it relieves him of his burden under *Sullivan* of establishing an adverse effect on his representation." *Id.* at 13. As the court explained, that argument is contradicted by the Court's decision in *Wood*, as well as subsequent Supreme Court decisions reciting the *Sullivan* rule without suggesting that it had been altered by *Wood*. *Id.* at 13-14.

Finally, the en banc court rejected petitioner's argument "that the district court erred in deciding that any actual conflict of interest did not adversely affect [the] representation." Pet. App. 14. To establish the requisite "adverse effect," the court stated, a defendant "must identify a plausible alternative defense strategy or tactic" not pursued by counsel; "show that [that] strategy or tactic was objectively reasonable"; and "establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict." *Id.* at 15. The en banc court agreed with the district court's "complete, thorough, and thoughtful" consideration of that issue, *id.* at 14, and held that petitioner had failed to show that the asserted conflict on Saunders' part, even if real, had any adverse effect on the representation. *Id.* at 16. Because it found no adverse effect, the court did not decide whether an actual conflict in fact existed. *Id.* at 9.

b. Judge Michael, joined by two other judges, dissented. Pet. App. 18-24. They believed that *Holloway*, *Sullivan*, and *Wood* establish that "[w]hen a trial judge ignores an apparent conflict, a defendant need only show that his lawyer labored under an actual conflict to establish a Sixth Amendment claim"; "[t]he defendant is not required to show that the actual conflict adversely affected his lawyer's performance." *Id.* at 18. Moreover, they considered that rule necessary to "encourage[] trial courts to pay strict attention to fundamental rights." *Id.* at 23. Because the dissenters believed that Saunders had an actual conflict of interest, they would have "award[ed] [petitioner] a writ of habeas corpus unless the Commonwealth of Virginia grants him a new trial," without requiring petitioner to show any adverse effect stemming from the conflict. *Id.* at 24.



## SUMMARY OF ARGUMENT

A. The Sixth Amendment is not violated when a trial court fails to inquire on its own initiative into a potential conflict of interest about which it reasonably should have known, unless the defendant shows both an actual conflict and an adverse effect. The Sixth Amendment guarantee of effective assistance of counsel does not exist for its own sake, but instead to protect the integrity of the trial process. Unless a defendant shows that an alleged deficiency in counsel's performance resulted in prejudice, the Sixth Amendment guarantee generally is not implicated. The Court has held that prejudice may be presumed when defense counsel is burdened by a conflict, but "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984). That settled rule governs the Sixth Amendment claim at issue in this case.

B. The court of appeals correctly concluded that this Court's decisions do not relieve a defendant of the burden of showing an adverse effect on the representation when a trial court fails to inquire into a possible conflict about which it should have known. When counsel objects at trial that the defense is burdened by a conflict, and the trial court fails to take appropriate corrective action, the Court has held that automatic reversal is warranted under the Sixth Amendment. *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). The

Court has explained that an attorney's own objection that he is laboring under a conflict is persuasive evidence that the representation has been or will be impaired. Moreover, prejudice may inhere in forcing an attorney to continue with a representation over his *own* objection that he is conflicted.

But when no objection is raised at trial, the Court has held that a defendant must show that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980). The Court has repeatedly recited *Sullivan*'s two-pronged inquiry in discussing the Sixth Amendment guarantee in the conflict-of-interest context. *Wood* v. *Georgia*, 450 U.S. 261 (1981), does not eliminate the requirement of showing an adverse effect when a trial court fails to inquire on its own initiative into an apparent conflict. The *Wood* Court never suggested that it was altering the rule of *Sullivan* and, indeed, its decision reflects that the Court looked not only to whether an "actual conflict of interest existed," but also to whether "counsel was influenced in his basic strategic decisions" by such a conflict. *Id.* at 272-273. That approach comports with the commonsense understanding that an "actual conflict," as opposed to a technical or theoretical conflict, is a conflict that *does* adversely affect the representation.

C. The *Sullivan* rule is well-founded and should be reaffirmed in this case. Requiring a defendant who does not object to any conflict at trial to show both an actual conflict and an adverse effect to prove a Sixth Amendment violation on collateral review squares with the principle that the Constitution only protects against deficiencies in counsel's performance that in fact prejudice the defense. *Holloway* is not to the contrary. Whereas an attorney's own objection that his hands are tied by a conflict is itself compelling evidence that a conflict has impeded the defense, the *absence* of such an objection suggests that there was no actual conflict, or at least that counsel did not feel constrained by



any conflict in undertaking the defense. Moreover, the risk of prejudice is much greater where, as in *Holloway*, the asserted conflict stems from the joint or simultaneous representation of conflicting interests, a concern not present here.

The principal reason that petitioner gives for dispensing with *Sullivan*'s adverse-effect requirement in this case is that the trial court should have known about the conflict and inquired into it. But that approach would give Sixth Amendment claimants a potential "windfall" based solely on whether there was a judicial lapse. The Court has declined to afford defendants such a windfall under the Sixth Amendment. *E.g.*, *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993). Moreover, the state of the record that exists in a collateral proceeding to determine whether an alleged conflict adversely affected the defense is the same when a defendant does not object at trial, regardless of whether the trial court should have inquired into the conflict. Nor is there any reason to adopt petitioner's rule to encourage trial courts to protect Sixth Amendment rights. State courts already are sworn under the Constitution to protect those rights.

Petitioner's approach also would invite manipulation of conflict-of-interest claims. Whereas the dichotomy created between *Holloway*'s automatic-reversal rule for when a defendant does object at trial and *Sullivan*'s rule for when a defendant does not object establishes an incentive for defendants to bring potential conflicts to the attention of the trial court, petitioner's rule would do the opposite: a defendant who knows about a possible conflict and does not object to it could secure reversal of a conviction on collateral review merely by showing that a conflict existed, and that the trial court *should* have inquired into it. Petitioner's rule also would unduly complicate the Sixth Amendment inquiry on collateral review by adding a mixed question of law and fact concerning whether the trial court knew, or should have known, about an alleged conflict.

D. The Court should reject petitioner's contention that, even if he is required to show an adverse effect, the court of appeals erred in requiring him to show a link between the alleged deficiency in counsel's performance and the alleged conflict. The *Sullivan* inquiry focuses on whether the alleged *conflict* impaired the representation, and not simply on whether the representation was deficient. The latter consideration is the focus of the typical *Strickland* claim and may be pressed as such. To establish a Sixth Amendment violation based on an alleged conflict of interest, a defendant must show not only that a conflict actually existed, but also that counsel's failure to pursue a viable alternative defense or strategy resulted from that conflict.

## ARGUMENT

### THE SIXTH AMENDMENT IS NOT VIOLATED WHEN A TRIAL COURT FAILS TO INQUIRE INTO A POTENTIAL CONFLICT OF INTEREST ABOUT WHICH IT REASONABLY SHOULD HAVE KNOWN, UNLESS A DEFENDANT SHOWS AN ACTUAL CONFLICT THAT ADVERSELY AFFECTED COUNSEL'S PERFORMANCE

#### A. The Constitution Only Protects Against Deficiencies In Counsel's Performance That Prejudice The Defense

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." That right is "fundamental to our system of justice." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981); see *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984); *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963). As this Court has explained, "[l]awyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured." *United*



*States* v. *Cronic*, 466 U.S. 648, 653 (1984) (footnote omitted). Further, "[t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U.S. at 685.

"[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Lockhart* v. *Fretwell*, 506 U.S. 364, 369 (1993) (quoting *Cronic*, 466 U.S. at 658). As a result, the Court has repeatedly emphasized that, "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Ibid.*; see *Strickland*, 466 U.S. at 686; *Kimmelman* v. *Morrison*, 477 U.S. 365, 374 (1986); *Nix* v. *Whiteside*, 475 U.S. 157, 175 (1986); *United States* v. *Morrison*, 449 U.S. at 364-365. In short, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. at 692.

Prejudice is always required to establish a violation of the Sixth Amendment right to counsel. In three specific contexts, however, this Court has held that prejudice may be presumed. The first two contexts involve cases in which a defendant is actually or constructively denied counsel. *Smith* v. *Robbins*, 528 U.S. 259, 287 (2000); see *Cronic*, 466 U.S. at 659 n.25. The Court has explained that "[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692. In addition, "such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Ibid.*

The other context in which the Court has held that prejudice may be presumed involves cases in which "counsel is burdened by an actual conflict of interest." *Robbins*, 528 U.S. at 287. As the Court explained in *Strickland*, however, the presumption of prejudice in that context is "more limited" than in the context of the actual or constructive denial of counsel. 466 U.S. at 692; see *ibid.* ("[T]he rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above."). "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Ibid.* (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980)); see *Robbins*, 528 U.S. at 287 ("'[P]rejudice is presumed when counsel is burdened by an actual conflict of interest,' although in such a case we do require the defendant to show that the conflict adversely affected his counsel's performance") (citation omitted); cf. *Holloway* v. *Arkansas*, 435 U.S. 475 (1978).[2]

Petitioner argues that this Court's precedents establish a more accommodating rule for evaluating Sixth Amendment claims when a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known. In that context, petitioner claims (at 25) that "[n]o showing of 'adverse effect' is required." As explained below, this Court's decisions do not support that contention.[3]

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[2] As discussed below (pp. 13-14), in *Holloway*, the Court found a Sixth Amendment violation based on an attorney's own objections that he was burdened by a conflict of interest in undertaking a joint representation of multiple defendants. The *Strickland* Court did not address *Holloway* in discussing the Sixth Amendment inquiry for conflict-of-interest cases.

[3] The Sixth Amendment principles discussed above apply in the same fashion in capital cases, and to capital sentencing proceedings. See *Strickland*, 466 U.S. at 686-687. Indeed, several of this Court's decisions involving claims of ineffective assistance of counsel arose from capital cases,



**B. Under This Court's Precedents, A Trial Court's Failure To Inquire Into An Apparent Conflict To Which The Defendant Did Not Object Does Not Eliminate The Need To Show An Actual Conflict Adversely Affecting The Representation**

Petitioner's argument that prejudice should be presumed without any inquiry into whether the alleged conflict adversely affected counsel's performance is grounded on his reading of the trio of *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), and *Wood* v. *Georgia*, 450 U.S. 261 (1981). The court of appeals correctly held that those precedents, along with subsequent decisions such as *Strickland*, require petitioner to show "both an actual conflict and an adverse effect" to establish a violation of his Sixth Amendment rights. Pet. App. 11.

1. a. In *Holloway*, a public defender was appointed to represent three defendants who were tried together on the same robbery and rape charges. Before trial, the public defender moved for appointment of separate counsel, asserting that his clients had potentially conflicting interests. The trial court denied that motion. The attorney renewed his objection on the eve of trial and again during the midst of trial, explaining that the conflicting interests of his clients would prevent him from fully examining, or cross-examining the codefendants when they took the stand to testify in their own defense. See 435 U.S. at 478. The trial court declined to take corrective action. The jury convicted all three defendants. On appeal, they "claim[ed] that their representation by a single appointed attorney, over their objection, violated [the Sixth Amendment]." *Id.* at 481. This Court agreed.

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including *Strickland* itself. See also, *e.g.*, *Lockhart* v. *Fretwell*, *supra*; *Burger* v. *Kemp*, 483 U.S. 776, 783 (1987). Petitioner here does not rely upon the capital nature of this case, or the Eighth Amendment, in arguing that he is entitled to relief under the Sixth Amendment.

*Holloway* held that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." 435 U.S. at 488. Prejudice is presumed without requiring a showing that the conflict adversely affected the representation. In so holding, the Court observed that defense counsel's timely objection to a conflict is itself "persuasive" evidence of a Sixth Amendment violation because counsel "in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop." *Id.* at 485-486. Moreover, attorneys must act with candor as "officers of the court," lending additional weight to such an objection. *Ibid.*

The Court also stated that prejudice inheres in requiring a defense attorney to proceed with a joint representation over his own objection that he is burdened by a conflict. The Court derived that principle from *Glasser* v. *United States*, 315 U.S. 60, 75-76 (1942), which the Court read as "presupposing] that * * * joint representation, over [defense counsel's] express objections, prejudiced the accused in some degree." 435 U.S. at 489. Finally, the Court observed that "a rule requiring a defendant to show that a conflict of interests—which he and his counsel tried to avoid by timely objections to the joint representation—prejudiced him in some specific fashion would not be susceptible of intelligent, evenhanded application." *Id.* at 490.[4]

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[4] In *Holloway*, the Court theorized about how a conflict of interest could impair an attorney's performance in the joint-representation context, see 435 U.S. at 490, but did not make any finding on impairment. In his dissent, Justice Powell questioned the Court's reliance on *Glasser* in that regard, pointing out that *Glasser* looked for "record support for [defendent's] claim of 'impairment' of his Sixth Amendment right to assistance of counsel." *Id.* at 492 (Powell, J., joined by Blackmun and Rehnquist, JJ.). At the same time, the record in *Holloway* established that the asserted conflict prevented counsel from fully examining or cross-examining his clients at trial. See *id.* at 478-480.



b. In *Sullivan*, the Court considered what is required to prove a Sixth Amendment violation when a defendant does *not* object to any conflict of interest at trial. Two lawyers represented three defendants who were charged with the same murders and tried separately. Sullivan was tried first and convicted. Neither Sullivan nor his lawyers objected to any conflict at trial. When his codefendants were subsequently acquitted, however, Sullivan collaterally attacked his conviction on the ground that he was "denied effective assistance of counsel because his defense lawyers represented conflicting interests." 446 U.S. at 338. The court of appeals held that just as in *Holloway*, the possibility of a conflict was "sufficient to prove a violation of Sullivan's Sixth Amendment rights." *Id.* at 340. This Court reversed.

The Court explained that in *Holloway* "[t]he trial court refused to consider the appointment of separate counsel despite the defense lawyer's timely and repeated assertions that the interests of his clients conflicted." 446 U.S. at 345. "[A] lawyer *forced* to represent codefendants whose interests conflict cannot provide the adequate legal assistance required by the Sixth Amendment." *Ibid.* (emphasis added). To help protect against such a failure, "*Holloway* requires state trial courts to investigate timely objections to multiple representations." *Id.* at 346. The *Sullivan* Court added that, "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry," and found that the facts in *Sullivan* did not trigger any such duty to inquire. *Id.* at 347.

The *Sullivan* Court recognized that the equation changes when a defendant does not object to any conflict at trial. When a trial court does not "fail[] to afford" a defendant "the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial * * *, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance." 446 U.S. at 348. Accordingly, the

Court held that, "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Ibid.*

c. *Wood* also involved a situation in which there was no objection to any conflict at trial. The Court granted certiorari in *Wood* to consider whether a state court improperly revoked the probations of three codefendants who were convicted of distributing obscene materials, simply because they had failed to pay fines imposed as part of their sentences. 450 U.S. at 264. After granting certiorari, the Court discovered that a possible conflict could have infected the lower court proceedings. The defendants' lawyer had been furnished by their employer, and was an agent of that employer. At the same time, the defendants' employer, which had initially agreed to pay any fines incurred by defendants, declined to pay the fines that had resulted in revocation of defendants' probation. See *id.* at 266-267.

Rather than decide the question on which it granted certiorari, the Court considered whether due process required that the defendants be afforded another revocation hearing untainted by any conflict in representation.[5] The Court stated that "[o]n the record before us, we cannot be sure whether counsel *was influenced in his basic strategic decisions* by the interests of the employer who hired him." 450 U.S. at 272 (emphasis added). But while the Court was unable to determine "whether an actual conflict of interest was present," it found that "the *possibility* of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further." *Ibid.*

[5] The Court did not consider that issue under the Sixth Amendment because the case before the Court involved a challenge only to the defendants' "probation revocations," and not to their underlying convictions. See 450 U.S. at 274 n.21.



That potential conflict, the Court concluded, required that the judgment be vacated and the case remanded to the state courts for a determination "whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier." 450 U.S. at 273. The Court added that, if the state court finds that "an actual conflict of interest existed at that time," then due process would require that the defendants be afforded a new revocation hearing. *Id.* at 273-274.

2. Petitioner argues (at 23) that *Wood* establishes that when a trial court fails to inquire into a potential conflict about which it reasonably should have known, a defendant "is entitled to a new trial upon the showing of an actual conflict of interests without more." The court of appeals correctly rejected that argument and held that "*Wood* does not relieve [petitioner] of showing an adverse effect" under the inquiry established by *Sullivan*. Pet. App. 14.[6]

a. The *Wood* Court never stated that it was establishing a new standard for determining when a Sixth Amendment violation exists because of a potential conflict about which the defendant did not object at trial. Indeed, far from purporting to make new *Sixth Amendment* law, the *Wood* Court expressly grounded its decision on principles of "due

[6] In the court of appeals, petitioner also advanced the more extravagant argument that "*Wood v. Georgia* changed the rule of *Sullivan* and extended the automatic reversal rule of *Holloway* to circumstances in which a trial court ignores a conflict about which it reasonably should have known." Pet. App. 11. The Fourth Circuit properly rejected that argument as well. See *id.* at 11-13. That conclusion follows *a fortiori* from the reasons that we state below for rejecting petitioner's narrower reading of *Wood*. Petitioner has not renewed his "automatic reversal" argument in this Court, and instead now acknowledges that to prevail he must at a minimum show an actual conflict.

process." 450 U.S. at 273. Moreover, although the *Wood* Court cited *Holloway* and *Sullivan*, see *id.* at 271-272 & n.18, the Court never stated that it was altering or overriding the framework established by those decisions, or that it was dispensing with the requirement of showing an adverse effect because the trial court failed to inquire into an apparent conflict. As the court of appeals observed below, "[o]verruling by implication is not favored." Pet. App. 13. This Court should be especially loathe to conclude that *Wood sub silentio* altered the rule of *Sullivan* when the Court decided the conflict-of-interest issue in *Wood* "without the benefit of briefing and argument." 450 U.S. at 272.

b. In arguing that *Wood* dispensed with *Sullivan*'s adverse-effect prong, petitioner relies (at 27-28) on the dispositional paragraph of *Wood*, emphasizing that in vacating and remanding the Court directed the state courts to consider whether "an actual conflict existed." 450 U.S. at 273. As the court of appeals explained, however, "[t]he *Wood* Court's instruction to the trial court amounts to no more than shorthand for [the] explicit two-part test [of *Sullivan*]." Pet. App. 14. Indeed, in considering "whether an actual conflict of interest was present," the *Wood* Court looked to "whether counsel *was influenced in his basic strategic decisions* by the interests of the employer who hired him." 450 U.S. at 272 (emphasis added).

In other words, as the court of appeals reasoned, the *Wood* decision indicates that the "Court used the term 'actual conflict' to refer to a conflict of interest that has adversely affected defense counsel's 'basic strategic decisions.'" Pet. App. 14 (quoting 450 U.S. at 272). That approach tracks the inquiry established by *Sullivan*. Moreover, it squares with the common-sense understanding that an "actual conflict," as opposed to a technical or hypothetical conflict, is a conflict that *does* adversely affect counsel's performance. See *Black's Law Dictionary* 33 (5th ed. 1979)



("Actual" means "[r]eal; substantial; existing presently in act; having a valid objective existence as opposed to that which is merely theoretical or * * * possible, virtual, theoretical, hypothetical, or nominal.").[7]

The First Circuit read *Wood* in the same terms in *Brien* v. *United States*, 695 F.2d 10 (1982). *Brien* involved a federal habeas claim that a defendant was denied effective assistance of counsel because his counsel was burdened by a conflict of interest into which the trial court should have inquired. In rejecting that claim, the court first stated that to satisfy the *Sullivan* standard "the conflict must be real, not some attenuated hypothesis having little consequence to the adequacy of representation." *Id.* at 15. The court then noted that *Wood* did not alter that inquiry. *Id.* at 15 n.10. The court added that "to establish an actual conflict of interest," a defendant must prove that counsel failed to pursue a "plausible alternative defense strategy" that was "inherently in conflict with the attorney's other loyalties or interests." *Id.* at 15. In other words, the defendant must show "an actual conflict of interest that adversely affected [his] representation." *Id.* at 16.[8]

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[7] That understanding is also supported by the fact that *Sullivan* did not state the pertinent inquiry in the conjunctive, but instead stated that a defendant "must establish that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 350. The *Sullivan* standard may be more easily applied, or readily understood, when stated in the conjunctive fashion used by the Court in framing the question presented in this case. But at the same time, the requirement of an *actual* conflict and of an *adverse effect* on the representation are complementary components of the same inquiry.

[8] Other courts have read *Wood* in a similar fashion. See, *e.g.*, *Mountjoy* v. *Warden*, 245 F.3d 31, 39-40 (1st Cir. 2001), petition for cert. pending, No. 00-10683 (filed June 18, 2001); *United States* v. *Burney*, 756 F.2d 787, 794 (10th Cir. 1985); but see *Ciak* v. *United States*, 59 F.3d 296, 302 (2d Cir. 1995) (interpreting *Wood* to "require[] reversal where a trial court neglects its duty to inquire about a particular conflict").

c. Petitioner points (at 28) to the dictum in footnote 18 of *Wood* that "*Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" 450 U.S. at 272 n.18. As the court of appeals below explained, however, that dictum does not override the rule of *Sullivan* either. Pet. App. 12-13. Footnote 18 is explicitly addressed to Justice White's dissent, which argued that the Court lacked jurisdiction to decide the due process issue in *Wood*. See 450 U.S. at 281. "Reading that footnote to require reversal in each case in which the trial court has failed to make an inquiry when it might know or should know of a conflict * * * leads to an application of the footnote * * * beyond that which was intended." Pet. App. 13.

Indeed, petitioner's reading is contradicted by the result in *Wood*. Although the *Wood* Court found that the trial court "should have been aware" of the potential conflict, the Court did not simply reverse the judgment but instead vacated and remanded for further consideration of whether "an actual conflict of interest existed." 450 U.S. at 272-273; see *Brien*, 695 F.2d at 15 n.10 (rejecting the argument that under *Wood* a "trial court's failure to inquire about potential conflicts in and of itself requires a reversal"). Furthermore, construing footnote 18 as dispensing with the adverse-effect requirement would be inconsistent with the focus in the Court's decision on whether the alleged conflict "influenced [counsel] in his basic strategic decisions." 450 U.S. at 272.

d. Petitioner's argument that *Wood* created a new rule that dispenses with *Sullivan*'s adverse-effect requirement also is belied by this Court's subsequent decisions. In the wake of *Wood*, this Court has repeatedly invoked the *Sullivan* standard in considering or discussing whether a Sixth Amendment violation exists based on a possible conflict of interest. See *Strickland*, 466 U.S. at 692; *Burger* v. *Kemp*, 483 U.S. 776, 783 (1987); *Perry* v. *Leeke*, 488 U.S. 272, 280 (1989); *Burden* v. *Zant*, 510 U.S. 132, 134 (1994); *Robbins*, 528 U.S. at 287.[9] In each of those cases, the Court recognized that its precedents "*do* require the defendant to show that the conflict adversely affected his counsel's performance." 528 U.S. at 287 (emphasis added). Although the Court has not explicitly addressed the interrelationship between *Sullivan* and *Wood*, the fact that it has never pointed to *Wood* as having established a different standard for apparent conflict cases in which no objection is made (or otherwise indicated that such a standard exists) provides further reason to reject petitioner's central proposition that the Court established such an independent inquiry in *Wood*.



### C. The Requirement That A Defendant Who Does Not Object At Trial Must Show Both An Actual Conflict And An Adverse Effect To Establish A Sixth Amendment Violation Is Well-Founded And Should Be Reaffirmed In This Case

The Court should reject petitioner's invitation to dispense with *Sullivan*'s adverse-effect requirement in this case.

1. Requiring a defendant who does not object to any conflict of interest at trial to show an adverse effect on the representation is consistent with the basic understanding that, "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Lockhart*, 506 U.S. at 369; see p. 11, *supra*. As the court of appeals below observed, under petitioner's rule "even a defense as brilliant as that of

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[9] In *Bonin* v. *California*, 494 U.S. 1039, 1043 (1990), Justice Marshall, joined by Justice Brennan, dissented from the denial of certiorari. They objected that the Court should have granted certiorari in that case "to decide whether a criminal defendant denied the right to conflict-free counsel must show that the conflict adversely affected his attorney's performance." In addition, they argued that "*Strickland*'s reading of *Sullivan* * * * is at odds with the holding in *Wood*," and that "a showing of actual conflict alone necessitates a new trial." *Id.* at 1043, 1046.

[Lord] Erskine would be impossible to justify if a technical conflict existed which had no effect on the performance." Pet. App. 18 n.7. Focusing exclusively on whether a conflict existed, without regard to whether such a conflict had any adverse effect on the representation, would expand the Sixth Amendment guarantee beyond its constitutional mooring.

*Holloway* is not to the contrary. Defense counsel in that case "repeated[ly]" objected "that the interests of his clients conflicted," but the trial court nonetheless "forced" him to proceed with the representation. *Sullivan*, 446 U.S. at 345. This Court concluded in *Holloway* that several considerations support a *per se* rule of prejudice in that context, perhaps foremost among which is that a lawyer's own representation that he is burdened by a conflict is compelling evidence that a conflict is impairing or will impair the defense. See 435 U.S. at 485-486 & n.9; Pet. App. 11. That is particularly true in the joint-representation context in which *Holloway* arose. See note 10, *infra*.

Moreover, as the Court reiterated in *Sullivan*, prejudice inheres in "forc[ing]" an attorney to represent a defendant over his own objection that he is burdened by a conflict that will impair his defense. 446 U.S. at 345. That was certainly true in *Holloway*, where counsel repeatedly advised the trial court that the conflicting interests of his client-codefendants would prevent him from fully examining, or if necessary cross-examining, them when they took the stand to testify at trial. See 435 U.S. at 478-481. Indeed, in *Holloway*, defense counsel's belief that he was burdened by a conflict circumscribed his examination of the codefendants in a manner that this Court has held amounts to the constructive denial of counsel altogether. See *Cronic*, 466 U.S. at 659 (citing *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974)).

By contrast, when defense counsel does not bring a potential conflict to the trial court's attention, there is no basis for presuming that a conflict existed or, even if so, that



a conflict actually impaired the defense. Just as an objection is persuasive evidence that an attorney is in fact laboring under a perceived conflict that will impede the representation, the *absence* of an objection suggests the opposite. An attorney's silence indicates that no conflict of interest existed, or at least that he believed that any technical conflict would not adversely effect his representation. Thus, in *Sullivan*, the Court explained that in the absence of a timely objection it was reasonable for a court to "assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." 446 U.S. at 347. Moreover, it is less likely that prejudice will inhere when counsel has not been "forced" to proceed with a representation over his timely objection that he is conflicted.

This case illustrates the problem with petitioner's rule. In contrast to *Holloway*, there is no objective indication in the trial record that petitioner's counsel believed that he was laboring under a conflict of interest. Indeed, the district court found that "Saunders did not believe that any 'continuing duties to a former client might interfere with his consideration of all facts and options for his current client.'" Pet. App. 69 (internal brackets omitted). Moreover, to the extent that a technical conflict existed, it was based on a prior representation of an individual on unrelated charges that lasted for eight days, consisted of one 15-to-30 minute meeting, and did not involve the exchange of any confidential information relevant to petitioner's case. See *id.* at 68-69. Yet petitioner's rule would require a court to presume prejudice based solely on the existence of a technical conflict due to the prior representation. Nothing in this Court's precedents compels that counter-intuitive result.[10]

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[10] The argument for presuming prejudice without any showing of an adverse effect is also problematic in light of the nature of the alleged con-

2. While petitioner does not take issue with *Sullivan*, he argues (at 29) that its adverse-effect prong is inapplicable when the trial court fails to inquire into an apparent conflict. Thus, under petitioner's approach, defendants would receive a "windfall" for purposes of the Sixth Amendment when a trial court neglects to inquire into a conflict it should have discovered. The same conflict of interest could produce two different results under the Sixth Amendment, depending on whether one trial judge or another presided over the trial, since a defendant who draws a judge who does not inquire into the conflict would be entitled to reversal without having to show any adverse effect. This Court has previously declined to accord defendants such a windfall under the Sixth Amendment, see *Lockhart*, 506 U.S. at 369-370; *Nix*, 475 U.S. at 175 ("[I]n judging prejudice and the likelihood of a different outcome, '[a] defendant has no entitlement to the luck of a lawless decisionmaker.'"), and for good reason.

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flict. The possible conflict in *Holloway*, *Sullivan*, and *Wood* arose from a lawyer's *simultaneous* representation of multiple clients or interests. The risk that a possible conflict will prejudice the defense is particularly great in that context. See *United States* v. *Tatum*, 943 F.2d 370, 376 (4th Cir. 1991). Thus, the Federal Rules of Criminal Procedure impose a duty on federal courts to inquire into the existence of a conflict in the joint representation context, but in no other context. See Fed. R. Crim. P. 44(c); *Wheat* v. *United States*, 486 U.S. 153, 161 (1988). The alleged conflict in this case did not entail the joint or simultaneous representation of conflicting interests, but rather a successive representation on unrelated charges and, even then, one in which the prior client was deceased. The risk that such a conflict, even if real, would adversely affect the current representation is much less severe than in the simultaneous representation context. Indeed, in this case, Saunders could have provided petitioner with the best possible defense without compromising the defense of his deceased prior client in *any* way. Thus, application of *Sullivan*'s adverse-effect prong is particularly appropriate outside the joint or simultaneous representation context to determine whether an alleged conflict violated a defendant's Sixth Amendment rights.



From the standpoint of ensuring that a defendant receives a fair trial, there is no more reason to *presume* a Sixth Amendment violation when a defendant fails to object to a conflict about which the trial court should have known than when a defendant fails to object to a conflict about which the court could not have known. In either case, the potential conflict is what threatens the integrity of the trial process and is the predicate for the Sixth Amendment claim. Likewise, the state of the record that exists in a collateral proceeding to determine whether a conflict existed and, if so, whether it actually infected the proceedings will be the same when a defendant does not object at trial, regardless of whether the trial court had any reason to know about the conflict. In either case, a court subsequently may take and evaluate evidence on whether an alleged conflict existed and impaired the representation, as the district court thoroughly did here. See Pet. App. 67-76. Such an inquiry fully suffices to vindicate the Sixth Amendment right.

The dissent below urged that an automatic-reversal rule is necessary to "encourage[] trial courts to pay strict attention to fundamental rights." Pet. App. 23. But the Constitution already obligates state judges to abide by and protect those rights. U.S. Const. Art. VI. There is no reason for this Court to adopt petitioner's *per se* rule on the assumption that additional incentives are necessary to ensure that state courts fully honor that duty. Cf. *Brecht* v. *Abrahamson*, 507 U.S. 619, 636 (1993). Nor is there any reason to adopt petitioner's rule to ensure that federal judges abide by their sworn oath to defend the Constitution, or their obligation to inquire into the existence of a conflict in the case of a joint representation under Rule 44(c) of the Federal Rules of Criminal Procedure. At the same time, declining to adopt petitioner's approach takes nothing away from this Court's admonishment in *Holloway* and *Sullivan* that trial courts should inquire into and eliminate potential conflicts when feasible.

3. Petitioner's argument for eliminating any inquiry into adverse effect when a trial court neglects to inquire into an apparent conflict also fails to account for the countervailing interests of the State and society at large in preserving final criminal convictions. "[W]ithout detracting from the fundamental importance of the right to counsel in criminal cases," this Court's Sixth Amendment decisions "recognize[] the necessity for preserving society's interest in the administration of criminal justice." *Morrison*, 449 U.S. at 364. Indeed, the standard that this Court adopted in *Sullivan*, and that it has reaffirmed since, for determining when the Sixth Amendment is violated based on a conflict is specifically grounded on that societal interest. See 446 U.S. at 350 ("[T]he possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.").

The potential cost to society of "impugning" convictions such as petitioner's is enormous. The evidence presented at trial overwhelmingly established that petitioner was guilty of the capital murder of Hall. See p. 2, *supra*. Granting petitioner's federal habeas petition would require the State to release petitioner or retry him. Retrying petitioner could prove difficult, not to mention costly, because nearly a decade has passed since Hall's murder. See *Brecht*, 507 U.S. at 637 ("Retrying defendants whose convictions are set aside * * * imposes significant 'social costs.'"). At a minimum, before the State and its citizens are required to incur that cost, petitioner should be required to show that the asserted conflict adversely affected his defense.

4. Petitioner's rule also could lead to the manipulation of conflict-of-interest claims by defendants. The dichotomy created by *Holloway*'s automatic-reversal rule for when a defendant does object to a conflict at trial, and *Sullivan*'s rule for when a defendant does not, creates an added



incentive for the defense to bring any potential conflict to the attention of the trial court. By contrast, petitioner's approach—which dispenses with *Sullivan*'s requirement of an adverse effect whenever a trial court fails to inquire into an apparent conflict—would provide the defense with a *dis*incentive to bring conflicts to the attention of the trial court, since remaining silent could afford a defendant with a reliable ground for reversal in the event of conviction. If the trial court did not discover the conflict, a defendant could secure reversal merely by showing that one existed.

At the same time, petitioner's approach would unnecessarily complicate the Sixth Amendment inquiry established by this Court's decisions by creating an additional mixed question of law and fact for consideration on federal habeas review concerning whether the trial court knew, or should have known, about a conflict. Particularly when the Constitution does not command that added inquiry, the Court should be reluctant to embrace it.

### D. In Applying The *Sullivan* Rule, The Court Of Appeals Properly Looked For A Link Between The Alleged Conflict And The Alleged Deficiency In Representation

Petitioner argues (at 46) that, even assuming he is required to show an adverse effect as well as an actual conflict, the court of appeals misconstrued "the 'adverse effect' prong of *Sullivan*." In particular, petitioner claims (at 46-47) that the court erred in focusing on whether counsel's failure to pursue a viable alternative defense or strategy was "linked to the actual conflict." Pet. App. 15. That argument also should be rejected.

The focus of the *Sullivan* test is whether "*an actual conflict of interest* adversely affected [the] lawyer's performance," 446 U.S. at 350 (emphasis added), and not simply whether the lawyer's performance was deficient—the focus of the typical *Strickland* claim. Indeed, *Sullivan*'s use of the

verb "affect" underscores that the pertinent inquiry is keyed to the conflict. That understanding squares with this Court's focus in *Wood* on "whether counsel was influenced in his basic strategic decisions *by the [alleged conflicting] interests*," 450 U.S. at 272 (emphasis added), as well as with the Court's application of the *Sullivan* standard in *Burger* v. *Kemp*. In *Kemp*, the Court considered whether "an adverse effect *resulted from [the attorney]'s actual conflict of interest*," and rejected that contention. 483 U.S. at 787 (emphasis added). See also, *e.g.*, *Freund* v. *Butterworth*, 165 F.3d 839, 860 (11th Cir.), cert. denied, 528 U.S. 817 (1999).[11]

The *Sullivan* inquiry does not require a reviewing court to ascertain counsel's subjective motivation for pursuing, or declining to pursue, a particular defense or strategy. *Sullivan* calls for an objective inquiry that first takes account of any conflicting interests, and then considers whether an attorney's performance was actually impaired by those interests. That inquiry is more searching than the automatic presumption of prejudice that this Court has reserved for situations in which a defendant has been actually or constructively denied counsel, but it is less taxing than the standard for showing prejudice in order to establish a violation of the Sixth Amendment in the absence of any conflict. See *Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). In that way, the *Sullivan* rule

[11] Petitioner asserts (at 48) that "[w]hatever his subjective motivations may have been, the objective fact is that [Saunders] was ethically *forbidden* to adopt the only motivational stance that a lawyer representing [petitioner] was permitted to have—a stance of undivided loyalty to [petitioner]." That argument is simply another way of getting to petitioner's *per se* rule that prejudice should be presumed if a technical conflict exists. As explained, neither this Court's precedents nor the practical considerations underlying them commend that approach.



strikes a proper balance between the recognition that conflicts of interests pose a worrisome potential threat to the integrity of the adversarial process, and the principle that the Sixth Amendment only protects against unprofessional conduct that actually prejudices the defense.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 2000

WALTER MICKENS, JR.,

*Petitioner,*

*v.*

JOHN B. TAYLOR, WARDEN,

*Respondent.*

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## MOTION OF LEGAL ETHICISTS AND THE STEIN CENTER FOR LAW AND ETHICS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

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38 pp

No. 00-9285

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# Supreme Court of the United States

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WALTER MICKENS, JR.,

*Petitioner,*

*v.*

JOHN B. TAYLOR, WARDEN,

*Respondents.*

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**On Writ of *Certiorari***
**To The United States Court of Appeals**
**For The Fourth Circuit**

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## MOTION OF LEGAL ETHICISTS AND THE STEIN CENTER FOR LAW AND ETHICS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Supreme Court Rule 37.3(b), movants Kathleen Clark, Deborah Coleman, Earl C. Dudley, Jr., Monroe Freedman, Stephen Gillers, Bruce Green, Donald Hilliker, David B. Isbell, John M. Levy, Margaret Love, Steven Lubet, Susan Martyn, James Moliterno, Deborah Rhode, Ronald Rotunda, George Rutherglen, Theodore J. Schneyer, Charles W. Wolfram and Fordham University's Louis Stein Center for Law and Ethics respectfully request leave to file the attached brief *amicus curiae* in support of petitioner. Movants have sought consent for their appearance as *amici curiae* from Petitioner Walter Mickens, Jr. and Respondent John Taylor, Warden of the Sussex I State Prison. Petitioner has consented, but Respondent has not.

Movants are fourteen law professors who are experts in legal ethics, four legal practitioners who are or have served as chairs of the ABA Standing Committee on Ethics and Professional Responsibility, and a university ethics center. Kathleen Clark, Professor at Washington University School of Law, has taught legal ethics since 1993. Deborah Coleman, Partner at Hahn Loeser & Parks, is a former chair of the ABA Standing Committee on Ethics and Professional Responsibility. Earl C. Dudley, Jr., Professor at University of Virginia School of Law, is a member of the Virginia State Bar Committee on Professionalism. Monroe Freedman, Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University Law School, has taught legal ethics since 1966 and is the author of UNDERSTANDING LAWYERS' ETHICS (1998). Stephen Gillers, Professor at New York University School of Law, has taught legal ethics since 1978, and is the author of a casebook, REGULATION OF LAWYERS (5th ed. 1998). Bruce Green, Stein Professor at Fordham University School of Law and Director of the Louis Stein Center for Ethics, has taught legal ethics since 1987. Donald Hilliker, Partner at McDermott Will & Emery is the present chair of the ABA Standing Committee on Ethics and Professional Responsibility. David B. Isbell, Senior Counsel at Covington & Burling, is a former chair of the ABA Standing Committee on Ethics and Professional Responsibility and teaches professional responsibility at Georgetown University Law Center. John M. Levy, Professor at the Marshall-



Wythe School of Law at the College of William and Mary and Director of the Graduate Program in the American Legal System, has taught legal ethics since 1976 and is author of ETHICS OF THE LAWYER'S WORK (1993). Margaret Love, Of Counsel at Brand & Frulla, is a former chair of the ABA Standing Committee on Ethics and Professional Responsibility. Steven Lubet, Professor of Law at Northwestern University and Director of Northwestern's Program on Advocacy and Professionalism, has taught ethics since 1984 and is coauthor of the course book EXERCISES AND PROBLEMS IN PROFESSIONAL RESPONSIBILITY (2d ed. 2001) and coauthor of the treatise JUDICIAL CONDUCT AND ETHICS (3d ed. 2000). Susan Martyn, Professor at University of Toledo College of Law, has taught legal ethics since 1977. James Moliterno, Professor at the Marshall-Wythe School of Law at the College of William and Mary and Director of its Center for the Teaching of Legal Ethics, has taught legal ethics since 1984, and is author of CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS (1999) and ETHICS OF THE LAWYER'S WORK (1993). Deborah Rhode, Ernest W. McFarland Professor at Stanford Law School and Director of the Keck Center on Legal Ethics and the Legal Profession, has taught legal ethics since 1979, and is author of the casebook, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998) and co-author of the casebook, LEGAL ETHICS (2d ed. 1995). Ronald Rotunda, Albert E. Jenner Jr. Professor at University of Illinois School of Law, has taught legal ethics since 1974, and is co-author of the casebook, PROFESSIONAL RESPONSIBILITY (7th ed. 2000). George Rutherglen, O.M. Vicars Professor of Law at the University of Virginia School of Law, is the Director of Graduate Program for Judges. Theodore J. Schneyer, Milton O. Riepe Professor of Law at the University of Arizona James E. Rogers College of Law, is the author of THE LAWYER IN MODERN SOCIETY (2d ed. 1976). Charles W. Wolfram, Charles Frank Reavis Sr. Professor Emeritus at Cornell Law School, has taught legal ethics since 1974, is the author of the treatise, MODERN LEGAL ETHICS (1986), and was the Chief Reporter for the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (American Law Institute

1999). The Louis Stein Center for Law and Ethics, based at Fordham University School of Law, sponsors programs, develops publications, supports scholarship on contemporary issues of law and ethics, and encourages professional and public institutions to integrate moral perspectives into their work. Over the past decade, the Stein Center and affiliated Fordham Law faculty have examined the ethical dimensions of the administration of criminal justice, including issues of conflicts of interest.

The potential *Amici* have an interest in ensuring that this Court recognize the fundamental and critical importance of the duty of loyalty to the lawyer-client relationship and the fair and impartial administration of justice in the adversarial system.

*Amici* focus on four issues that support Mickens' Brief. First, the historical and universal importance of the duty of loyalty in shaping the ethical duties of counsel in the United States. Second, the nature of conflicts of interest and the appropriate analysis for determining when a conflict of interest exists. Third, the practical and philosophical error in importing an adverse effect test into the Court's Sixth Amendment analysis in the circumstances of this case. Fourth, and finally, the fundamental analytical error in the Fourth Circuit's adverse impact analysis, given the nature and effect of conflicts of interest.

Based upon the above, movants respectfully request that the Court accept their attached brief for filing.

Respectfully submitted,

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Dated: July 19, 2001

No. 00-9285

IN THE

# Supreme Court of the United States

OCTOBER TERM, 2000

WALTER MICKENS, JR.,

*Petitioner,*

*v.*

JOHN B. TAYLOR, WARDEN,

*Respondent.*

**On Writ of *Certiorari***
**To The United States Court of Appeals**
**For The Fourth Circuit**

## BRIEF OF LEGAL ETHICISTS AND THE STEIN CENTER FOR LAW AND ETHICS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI*[1]

The interest of *Amici* is set forth in the accompanying motion for leave to file this brief *amicus curiae*.

## SUMMARY OF ARGUMENT

It is the view of *amici* that a conflict exists when counsel has other interests that pose a substantial risk of materially and adversely affecting the representation of the client. In the present case, no matter by what standard Saunders' representation of Mickens is judged, (1) Saunders was laboring under a conflict of interest that must be cognizable under this Court's Sixth Amendment ineffective assistance standard; (2) this conflict was unwaiveable; and (3) under the circumstances here, as a matter of legal ethics and Sixth Amendment jurisprudence, Mickens should not be obliged to demonstrate any "adverse" effect. It is further *amici's* view that the *en banc* majority's conclusion that Mickens failed to prove the necessary adverse affect demonstrates why that burden, if placed on defendants whose counsel labors under a conflict of interest, will result in many defendants receiving unremedied ineffective assistance of counsel. In any event, the adverse effect on Mickens in this case was profound and requires a new trial.

## ARGUMENT

> No servant can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other.
>
> — *Luke* 16:13 (King James).

As one of the oldest statements forbidding a conflict of interest, the most important aspect of the above Biblical passage is that it is neither cautionary nor aspirational — it is a simple prohibition. *Amici* consider that the wisdom of this ancient dictum has informed the profession's long-standing

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1. *Amici curiae* state, pursuant to Sup. Ct. R. 37.6, that this brief was not authored in any part by counsel for any party, and that no person or entity made any monetary contributions to its preparation or submission.

adherance to the principle of client loyalty and should inform this Court's deliberation of this important case.

* * *

To execute a man who was represented at his trial and first appeal by a lawyer who did not disclose that he represented the victim up until his death is the very antithesis of our system's commitment that a person facing loss of money or freedom, let alone life, is guaranteed his very own champion. To allow the execution to occur when the trial judge was on notice of the conflict, compounds the betrayal; the defendant then has been denied not only the loyalty of his lawyer, but also the guardianship of the court. But perhaps of even greater significance to *amici* — indeed, what has brought *amici* together to present this brief — is the concern that to permit Mickens' execution, on these facts, would undermine public confidence in the fairness of the judicial system.

What is the public to think when it learns that a man has been executed after being represented by a lawyer who, in effect, switched sides, that the lawyer did so with the imprimatur of the courts, but without telling his client, and that when this unethical and unseemly conduct came to light, the client was told it is he who must prove how this profound conflict affected his lawyer's performance? Surely the public will conclude that this defendant has been betrayed not once, but twice, first when this lawyer was assigned and second when he, the injured client, was saddled with the onerous burden of proving adverse effect. But the public will also conclude that the system has been betrayed in a way that undermines confidence not just in the result in this case, but in all future cases.

As this Court recognized in *Wheat v. United States*, 486 U.S. 153 (1988), the "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* at 160. The public expects, as it should, that when an accused is brought before a court the accused has the undivided loyalty of counsel. Anything less than guardianship by the courts for loyalty of counsel undermines not only the lawyer-client relationship, but also public support for the justice system.



## I. BECAUSE OF THE FUNDAMENTAL NATURE OF A LAWYER'S DUTY OF LOYALTY, CONFLICTS OF INTEREST ARE DIFFERENT BOTH IN DEGREE AND IN KIND FROM OTHER ETHICAL AND REPRESENTATIONAL FAILURES.

### A. A Lawyer's Loyalty to his Client Has Always Been his *First* Duty – from the Very Beginning of the Legal Profession through its Universal Application Today.

Recognition of the importance of lawyer loyalty has been eloquently expressed for centuries. In 1820, in one of its most famous articulations, Lord Brougham described the obligation to serve the client:

> [A]n advocate, by the sacred duty which he owes his client, knows . . . [t]o save that client, by all expedient means, to protect that client, at all hazards and cost to all others . . . .

HENRY LORD BROUGHAM, SPEECHES OF HENRY LORD BROUGHAM 63 (1841), *quoted in* Steven H. Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227, 228 n.18 (1987). In 1824, Chief Justice Story delineated the terms of the duty of loyalty owed by a lawyer to his client:

> I agree to the doctrine urged at the bar, as to the delicacy of the relation of client and attorney, and the duty of a full, frank, and free disclosure by the latter of every circumstance, which may be presumed to be material, not merely to the interests, but to the fair exercise of the judgment, of the client. An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. No man can be supposed to be indifferent to the knowledge of facts, which work directly on his interests, or bear on the freedom of his choice of counsel. When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no

> engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity.

*Williams v. Reed*, 29 F. Cas. 1386, 1390 (C.C.D. Me. 1824).

This Court recognized early on that courts were obliged to monitor the behavior of the lawyers before them to ensure that the lawyer's duty of loyalty was fulfilled:

> There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

*Stockton v. Ford*, 52 U.S. 232, 247 (Dec. Term, 1850).

Every state bar has an ethical rule prohibiting a lawyer from undertaking a representation that involves a conflict of interest. *See* NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY, Vols. I – IV, *generally* (University Publ'ns of Am. 2001)(reprinting the codes of professional responsibility for all fifty states). Most of these rules are derived from, or literally copied from the ABA Code of Professional Responsibility or the ABA Model Rules of Professional Conduct. While ethics codes vary in their particulars from jurisdiction to jurisdiction, they all condemn Saunders' conduct here.

### B. CONFLICTS OF INTEREST ARE DIFFERENT IN DEGREE *AND* IN KIND FROM OTHER ETHICAL VIOLATIONS AND FAILURES IN REPRESENTATION.

Conflicts of interest infect the lawyer-client relationship in subtle ways, leaving the entire representation suspect. As this Court has recognized, a legal representation "contains a



myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are part of the record." *Young v. United States*, 481 U.S. 787, 812-13 (1987) (discussing the effect of a non-disinterested prosecutor). Unlike other ethical or representational failures, which are discrete and whose effects are manifest and readily measured, a conflict of interest casts a shadow over every aspect of the lawyer-client relationship.

A breach of the duty of loyalty is worse than other ethical breaches because it is a breach of the most fundamental duty owed to a client. It is also a substantively different type of breach because it affects invisibly every decision in the representation. Depending on the conflict and the representation, this breach can blunt a lawyer's advocacy, undermine a lawyer's independent professional judgment, and inhibit a lawyer's creativity and zeal. A suspect representation, which could have failed in so many places and at so many levels, produces a verdict that has not been adequately tested by the adversarial process and, thus, cannot be trusted.

While unrevealed conflicts always cast these shadows on the representation, the problem is particularly acute in criminal representations, especially capital cases. There is no way to recreate what might have, could have, or should have happened if the accused were represented by a lawyer with undivided loyalty. The defense of capital cases is an art, not a science. Each case is literally unique. The decision-tree from retainer to final appeal includes hundreds of branches — dead ends, false starts and choices, ranging from the minor — do I ask one more question on cross-examination? — to the major — should the client defend on self-defense or insanity? As a result, when confronted with a case involving a conflict of interest violation this Court must be particularly sensitive to the harm the client suffered and to the damage to the system of justice any failure to remediate the ethical lapse will cause.

## II. UNDER ANY ANALYSIS, SAUNDERS' CONFLICT OF INTEREST SHOULD BE COGNIZABLE UNDER THE SIXTH AMENDMENT.

### A. Sixth Amendment Jurisprudence is Hamstrung Because it Lacks a Clear and Easily Applied Definition of Conflict.

The Sixth Amendment case law addressing when conflicts of interest are constitutionally cognizable often attempts to distinguish (or seems to) between conflicts that are "actual" or "real", and those that are "potential" or "technical." It is the view of *amici* that such distinctions are not really helpful, are not found in the rules governing the legal profession and should be set aside in favor of an approach squarely based on the rules of professional conduct. These rules merely inquire whether a conflict of interest exists. If it does, they bar the representation.

The various opinions in this case alone reveal a bewildering number of competing concepts: conflict of interest; actual conflict; technical conflict; potential conflict; apparent conflict; genuine conflict; actually representing conflicting interests; possible conflict; a conflict that never ripened into an actual conflict; a conflict of interest that actually affected the adequacy of representation; a client actually saddled with a genuine conflict; and, finally, a conflict of interest that actually existed. And an analysis of other case law demonstrates that these various formulations are anything but aberrational.[2]

2. Numerous trial and appellate courts have stumbled over claims of ineffective representation based on conflicts of interest because the courts lack a clear and useful definition for a conflict. *See, e.g., (in order of Courts of Appeal), United States v. Sotomayor-Vazquez,* 249 F.3d 1, 15 (1st Cir. 2001) ("To show an actual conflict of interest, the defendant must show that 'the lawyer could have pursued a plausible alternative defense strategy or tactic' and that 'the alternative strategy or tactic was inherently in conflict with or not undertaken due to the attorney's other interests or loyalties.'"); *Amiel v. United States,* 209 F.3d 195, 198 (2d Cir. 2000) (holding that an actual conflict occurs when a lawyer and client's interest "diverge with respect to a material factual or legal issue or to a course of action"); *Hess v. Mazurkiewicz,* 135 F.3d 905, 910 (3d Cir. 1998) (same); *Perillo v. Johnson,* 205 F.3d 775, 801-02 (5th Cir. 2000) (holding that an actual conflict occurs when a lawyer places himself in a situation "inherently conducive to divided loyalties," and claimant shows "something more"); *United States v. Hall,* 200 F.3d 962, 965-66 (6th Cir. 2000) (holding that the Court will not find an actual conflict unless claimants "can point to 'specific instances in the record to suggest an actual conflict or impairment of their interests'"); *Stoia v. United States,* 22 F.3d 766, 771 (7th Cir. 1994) ("An actual conflict of interest results if the defense attorney was required to make a choice advancing his own interests to the detriment of his client's interests."); *Nave v. Delo,* 62 F.3d 1024, 1034 (8th Cir. 1995) (holding that the claimant must show "that his counsel actively represented conflicting interests"); *United States v. Hearst,* 638 F.2d 1190, 1194 (9th Cir. 1980) (holding that an actual conflict is one that adversely affects the defense lawyer's performance); *United States v. Migliaccio,* 34 F.3d 1517, 1526 (10th Cir. 1994) ("Defense counsel's performance [is] adversely affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests."); *Reynolds v. Chapman,* No. 00-12207, 2001 U.S. App. LEXIS 13493, at *15 (11th Cir. June 15, 2001) (holding that a claimant must show "inconsistent interests" and show that his counsel "acted in some way that reflected the reality of these conflicting interests."); *United States v. Taylor,* 139 F.3d 924, 930 (D.C. Cir. 1998) (holding that "the defendant's burden is to show that counsel actually acted in a manner that adversely affected his representation by doing something, or refraining from doing something, that a non-conflicted counsel would not have done"); *People v. McDonald,* 496 N.E.2d 844, 847 (N.Y. 1986) (holding that an actual conflict is one that bears a "substantial relation" to the defense).



These competing concepts obscure and confuse what should be a straightforward approach to determining whether conflicts of interest cognizable under the Sixth Amendment are present in any given case. *Amici* submit that the approach they suggest below will eliminate the underlying confusion and clarify the standard for finding a conflict.

### B. The Well Established Ethical Standard for Conflicts of Interest Should Be Applied in These Cases.

In the view of *amici,* an analysis of this case should spring from the universal and longstanding ethical rules of the profession, rules that this court has recognized many times in the past to inform itself of the proper standards it should adopt in the Sixth Amendment context. *See, e.g., Swidler & Berlin v. United States,* 524 U.S. 399, 406-07 (1998); *Wheat,* 486 U.S. at 160; *Nix v. Whiteside,* 475 U.S. 157, 165-66 (1986); *Cuyler v.*

*Sullivan*, 446 U.S. 335, 346 (1980); *see also Michigan v. Harvey*, 494 U.S. 344, 367 n.12 (1990) (Stevens, J. dissenting).

It is noteworthy that in none of the generally accepted ethical formulations — the Model Code, the Model Rules, the Restatement (Third) of Law Governing Lawyers — do the words "actual", "potential", "real" or "technical" appear. It is also noteworthy that none requires proof of an actual adverse effect. Rather, each reflects an obligation to identify the lawyer's diverging interests: The Model Code refers to the lawyer's "own financial, business, property, or personal" and "differing interests." MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101(A), 5-105(A) (1983) [hereinafter "MODEL CODE"]. The Model Rules refer to "responsibilities to another client or to a third person, or by the lawyer's own interests." MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2001) [hereinafter "MODEL RULES"]. The Restatement refers to a "lawyer's own interests" or "the lawyer's duties to another current client, a former client, or a third person." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 121 (American Law Institute 1999) [hereinafter "RLGL"].

But finding differing interests between lawyer and client, while necessary to finding a conflict of interest, is not in itself sufficient. These formulations also include terms of limitation designed to assure that an ethically cognizable conflict is not a trivial or immaterial matter. In the Model Code, the terms of limitation are that "the exercise of" the lawyer's "professional judgment will be or reasonably may be affected" by these other interests, *see* MODEL CODE DR 5-101(A); alternatively the exercise of professional judgment "will be or is likely to be adversely affected" by the proffered employment "or it would likely involve him in representing" differing interests. *See* MODEL CODE DR 5-105(A). In the Model Rules, the standard is whether the representation "may be materially limited." MODEL RULE 1.7(b). Finally, the Restatement captures — and, in the view of *amici*, captures best — these terms of limitation when it refers to the existence of "a substantial risk that the lawyer's representation of the client would be materially and adversely affected" by the other interests or duties. *See* RLGL, § 121.



Significantly, the analysis under the generally accepted legal ethics conception does not require an "adverse" effect on the representation. Rather, the analysis focuses on the *risk of materially divergent interests* and the *risk* of an adverse effect. "In the modern view, a conflict of interest exists whenever the attorney-client relationship or the quality of the representation is 'at risk,' *even if no substantive impropriety — such as a breach of confidentiality or less than zealous representation — in fact eventuates.* The law of lawyering then proceeds by assessing the risk and providing an appropriate response." GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 10.4, at 10-11 (3d ed. 2001) (citations omitted). This provides courts with an objective test to determine whether a lawyer is burdened with a conflict. That test is reflected in the following question: did the lawyer have *other interests* that posed a *substantial risk* of *materially and adversely* affecting the representation? Applying this standard to Mickens' representation by Saunders we can recognize the conflicts of interest with little difficulty.

### C. SAUNDERS WAS BURDENED WITH MULTIPLE DIVERGENT INTERESTS THAT PRESENTED A SUBSTANTIAL RISK OF MATERIALLY AND ADVERSELY AFFECTING MICKENS'S REPRESENTATION.

#### 1. SAUNDERS WAS SUBJECT TO MULTIPLE DIVERGENT INTERESTS.

This case involves not one, but several divergent interests. These divergent interests can be divided into two categories: those that involved Saunders' other client, Hall, and those that were simply personal to Saunders.

Saunders owed two related but separate duties to Hall: a duty to keep his confidences and a more pervasive duty of loyalty. The codes of ethics are uniform in providing that a lawyer's duty to keep confidences continues after the lawyer-client relationship is terminated. Indeed, the lawyer's duty to protect his client's confidences survives even the client's death. *Swidler & Berlin*, 524 U.S. at 410-11. The district court below identified four confidences from Hall, each of which Saunders

was bound not to reveal under the applicable provision of the Virginia Code Professional Responsibility DR 4-101.[3] *See Mickens v. Greene*, 74 F. Supp. 2d 586, 599, 606 (E.D. Va. 1999) (citing transcript of Saunders' deposition taken on December 23, 1998).

Saunders also owed Hall a duty of loyalty. This duty is reflected in the professional rules that provide that a lawyer may not take on a representation (in this case Mickens) that may be materially limited by the lawyer's duties to others (in this case Hall) or to himself. Given that Sanders represented Hall at the very date of his death, this material limitation becomes likely. Its likelihood is increased by the fact that the character and conduct of the victim were clearly at issue — a condition that is present in every capital case because of the free range of inquiry at the penalty phase of the proceeding and that was particularly pertinent here because of the circumstances of this crime.

Saunders also labored under at least two *personal* divergent interests: a pecuniary interest in the representation and an interest in escaping disciplinary proceedings. When he was offered the opportunity to take on this matter Saunders said nothing to the Court about his role as a defense counsel to Hall on charges that had been dropped the prior Friday and, once his silence failed to prevent the Court from making an appointment the Court knew or should have known was suffused with a conflict of interest, Saunders needed to maintain silence in order to keep it.

While almost all lawyers have a pecuniary interest in their clients — lawyers must make a living — Saunders' interest in the Mickens representation moved beyond the ordinary. This

3. These were: (a) Hall had been charged with carrying a concealed weapon at the intersection of 27th Street and Marshall in Newport News; (b) Hall's mother had pressed charges against him for assault; (c) Hall was not living with his mother at the time of his death; (d) Saunders had discussed with Hall "the circumstances surrounding each of the charged crimes." In addition, the very existence of juvenile charges against Hall was confidential since in Virginia juvenile court records are sealed absent a court order. *See* VA. CODE ANN § 16.1-305 (Michie 1992); *Mickens*, 74 F. Supp. 2d at 600.



was a high-profile capital representation that, unlike the juvenile court representations with which Saunders had apparently been supporting himself, had the advantages of enhancing his prestige and visibility. It also paid a higher hourly rate and imposed no fee cap on the total amount he could charge. *See* VIRGINIA CODE ANN. § 19.2-163 (Michie 1992).

This interest was only exacerbated by Saunders' other personal interest: to avoid professional discipline. Once Saunders undertook Mickens' representation he had violated the Virginia Code of Professional Responsibility in at least three respects. First, he had not been candid with the tribunal about the representation of Hall. *See* VIRGINIA CODE OF PROF'L RESPONSIBILITY DR 7-102(A) (Michie 1992). Second, he had failed to disclose the prior representation to his new client, Mickens. *See id.* EC 7-8, EC 5-19. Third, he had undertaken a conflicting representation on an undisclosed basis. *See id.* DR 5-105(C); *see also Dowell v. Commonwealth*, 351 S.E.2d 915, 917-18 (Va. Ct. App. 1987). It is all these obvious and serious divergent interests that serve as a predicate for the next part of the analysis.

### 2. SAUNDERS' DIVERGENT INTERESTS WERE MATERIAL AND ADVERSE, AND POSED A SUBSTANTIAL RISK TO MICKENS' REPRESENTATION.

If any of Saunders' divergent interests, either separately or cumulatively, were material, adverse and caused a substantial risk to Mickens' representation, then Saunders labored under conflict. To be "material", the interest must pose a risk to one of a lawyer's duties to his current client (i.e. Mickens); to be "adverse", the interest must pose a risk that it will create an incentive for the lawyer to do something not in his client's best interest. *See* RLGL § 121 cmt. c(i & ii). A "substantial risk" has been defined by the case law as a risk that is *significant* and *plausible*, even if it were not certain or even probable that injury will occur. *See* RLGL § 121 cmt. c(iii). Thus, Saunders' divergent interests burdened him with a conflict if any or all of those interests diverged from Mickens' on any aspect of the case, and thereby posed a significant and plausible risk to the representation.

While it is thus critical to evaluate the divergent interests against these three standards, "material," "adverse" and "substantial risk," it is unnecessary, and, in fact, unhelpful, to rely on the record of trial to determine these issues. Rather, the ethical rules examine these questions prospectively, which is how this Court should examine them — from the point where the interests began to diverge.[4]

The existence of a conflict here can be illustrated by evaluating Saunders' duty to examine and investigate the nature and circumstances of the crime thoroughly in order to determine the best lines of defense.[5] Each of Saunders' divergent interests — his duty of confidentiality and loyalty to Hall, his pecuniary interest in the representation, and his interest in avoiding disciplinary proceedings — created the same incentive: to avoid investigating Hall at all. This fundamentally sabotaged Saunders' pre-trial preparation because he was compelled to make judgments based not on objective and dispassionate strategy but, instead, upon considering his own situation and concerns — forces with which an unconflicted lawyer would not be saddled.

First, Saunders was barred from revealing any confidential information regarding Hall. This crippled Saunders' pre-trial investigation from its inception and was clearly not in Mickens' best interest. Any and all facts regarding the crime must be gathered, even if they are rendered unimportant and the approaches they suggest are discarded in favor of better strategies later. A lawyer cannot make the best choice if he systematically ignores crucial information. By itself, Saunders'

4. In fact, reliance on the record of the trial to determine that the interests were material, adverse and posed a substantial risk to the relationship will twist the analysis and systematically cause courts to underestimate the negative effect of these interests because the sins of conflict are sins of omission that leave a record bereft of evidence. *See infra* at pp. 18-21.

5. "Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." ABA STANDARDS OF CRIMINAL JUSTICE § 4-4-1(a) (1993). This is not to say that Saunders' divergent interests did not affect his other duties to Mickens, but the corruption of one material duty demonstrates that Saunders operated under a conflict of interest.



duty to keep Hall's secrets posed a plausible, significant risk to Saunders' ability to perform an adequate pre-trial investigation, thereby creating a conflict.

Second, Saunders' duty of loyalty to Hall affected his ability to advocate zealously for Mickens. While the multiple ways that loyalty interest affected the representation might be harder to pinpoint, several courts that have examined a case where the lawyer for the defendant also represented the victim have expressed the appropriate level of concern about the conflicts of interest thus presented. *See Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974); *United States ex rel. Miller v. Myers*, 253 F. Supp. 55, 57 (E.D. Pa. 1966); *People v. McDonald*, 496 N.E.2d 844 (N.Y. 1986); *State v. Aguilar*, 536 P.2d 263 (N.M. Ct. App. 1975).

That the Courts respond this way is not surprising because it is difficult to imagine Saunders' loyalty to Hall as not having a profound effect on Mickens' representation. Saunders is appointed to represent Hall on serious charges. If Saunders is like any other lawyer, he immediately prepares to defend Hall, learning the facts of the case, meeting with the client, assessing the charges, preparing to advocate on his behalf. Saunders then knew Hall not as a docket number and a mug shot, but as an individual reposing his trust in Saunders to act in his best interests, defending him against the charges, learning Hall's version of the events in conversations cloaked with confidentiality.

Suddenly Hall was the victim of a brutal homicide whose alleged perpetrator, Mickens, Saunders is defending against the charges of murder. Now Saunders is obliged to investigate all the disparaging, humiliating, and potentially criminal behavior of Hall from the time when Hall was still his client. And he must do so against the backdrop of whatever feelings of sadness, anger and retribution Saunders — no matter how diffident he now seems — then feels about his client's tragic death, as well as against whatever commitment of loyalty, no matter how subconscious, Saunders still has toward the deceased. While no one will ever know — perhaps not even

Saunders — what effect all that had, it is hard to conceive it did not have a significant effect on Saunders' representation of Mickens.

Third, Saunders' pecuniary and reputational interests only reinforced the incentives created by his conflicting duties to Hall. Even if Saunders did not recognize his obligations to Hall as a former client, he certainly recognized his own self-interest in keeping the prior representation of Hall a secret — a fact that would be revealed as soon as Saunders attempted to conduct any of the investigation of the victim, especially any investigation of Hall's family and associates, the very people who would have known of the prior conflicting representation.

The need to conduct a complete pre-trial factual investigation, the serious consideration necessary to decide whether to place the victim's conduct at issue in the guilt phase, and the absolute requirement of lessening sympathy for the victim in the penalty phase yielded a high risk, even a certainty, that the representation would be adversely affected. And it turned out that Saunders failed to undertake the investigation of or address Hall's conduct or character in any aspect of the trial — omissions so glaring that their only explanation was Saunders' recognition of the conflict. And since the effect of those divergent interests — maintaining silence; doing no investigation; not trying the victim or even diminishing sympathy for him — was the same as that created by Saunders' other conflicts of interest, by definition these personal interests, created a significant risk of an adverse effect on the representation of Mickens that unfortunately was realized as the representation unfolded.

### 3. The *En Banc* Opinion Analysis of the Effect of Saunders' Divided Interests Is Fundamentally Flawed.

In rejecting the idea that Saunders' divergent interests could play any role in Mickens' defense, the Court of Appeals majority opinion relied on the testimony of Saunders dismissing such concerns. While Saunders might have believed his allegiance to Hall "ended when [he] walked into the court-



room and they told [him], [Hall] was dead and the case was gone," *see Mickens*, 74 F. Supp. 2d at 605, Saunders' bald assertion to that effect cannot overcome a charge of subconscious bias. *See In re Williams*, 309 N.E.2d 579, 581 (Ill. 1974); *see also Swidler & Berlin*, 524 U.S. at 410-11; *People v. Thomas*, 545 N.E.2d 654 (Ill. 1989); San Diego Cty. Bar Ass'n Ethics Comm., Op. 1993-2 (1994) (holding that a law firm cannot represent a man accused of murdering a former (obviously dead) client).

Furthermore, Saunders' assertion that he believed there was no conflict is belied by his concealment of his relationship to Hall. If Saunders did not believe he owed any duties — including a duty to keep confidences — to Hall, why did he not disclose to his client, his co-counsel, or the court that up until his former client's unfortunate death, he had been representing the victim, Hall? Saunders silence about Hall through the course of trial, appeal, remand, resentencing, another appeal and state post-conviction review simply defies a benign explanation.

### D. Mickens Could Not Be Asked to Consent to Saunders' Conflicts of Interest.

A critical circumstance in this case is that throughout the course of the trial and appeal in the state courts, Mickens was unaware of the conflicts that affected Saunders' representation of him. But assuming he *had* known and the trial court had offered him the opportunity to waive the conflicts — instead of simply appointing other, unconflicted counsel — Mickens could not have given the required consent.

First, in order to secure from Mickens effective consent to the conflict, Saunders would have been forced to disclose to Mickens his prior representation of Hall. But that fact, without more, was confidential, not only because all juvenile court records in Virginia are sealed, but also because it was a secret under the ethics code and, therefore, non-disclosable. *See* VA. CODE OF PROF'L RESPONSIBILITY DR 4-101 (Michie 1992). When a lawyer cannot disclose enough information to permit the client to consent after consultation, the result is that the lawyer must simply decline proceeding further. *See* RLGL

§ 122 cmt. c(i) ("if means of adequate disclosure are unavailable, consent to the conflict may not be obtained").

Second, even if Saunders could have disclosed the fact of his representation of Hail, he could not have disclosed the confidential information about the representation necessary to permit Mr. Mickens to make a judgment whether this conflict was one he was willing to waive. In order for a waiver to be effective it must be fully informed, and the court must have been able to warn the defendant both of his right to alternate counsel and of the "potential hazards posed by the conflict of interest." *United States v. Rodriguez*, 929 F.2d 747, 750 (1st Cir. 1991). Courts must invalidate waivers when they are secured based on misrepresentations or inadequate disclosure of the potential consequences. *See, e.g., State v. Johnson*, 823 P.2d 484 (Utah Ct. App. 1991).

Third, the standard test to determine if a conflict is non-waiveable is whether a "disinterested lawyer would conclude that the client should not agree to the representation under the circumstances." MODEL RULES 1.7 cmt. 5; *see also Burger v. Kemp*, 483 U.S. 776, 810-11 (1987) (Blackmun, J. dissenting). If so, "the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." *Kelley's Case*, 627 A.2d 597, 600 (N.H. 1993).

The non-waiveability of this conflict is best demonstrated by considering what conversation would have been required between Saunders and Mickens had a waiver been sought. Saunders would have been forced to explain to Mickens — whose life was literally on the line — that he, Saunders, was perfectly happy to represent Mickens, but Mickens would have to understand that, in undertaking the representation, Saunders would not be able to conduct a full pre-trial investigation into the character and conduct of Hall, that Mickens would not be able to put the victim on trial at all and that Saunders would be barred from challenging any characterization of Hall as other than a person worthy of the jury's highest sympathies. Moreover, Saunders would have to tell Mickens that he could not inform him the reason for the limitations he was imposing on the representation. No reasonable lawyer, in good conscience, could ask a client to accept these restrictions when any other lawyer assigned to the case could proceed unfettered. Moreover, no client could give informed consent to the request and no court could have accepted it.



## III. REQUIRING MICKENS TO SHOW THE CONFLICTS OF INTEREST ALSO HAD AN ADVERSE EFFECT WOULD BE IN DIRECT CONFLICT WITH THE TREATMENT OF CONFLICTS OF INTEREST UNDER GENERALLY ACCEPTED PRINCIPLES OF LEGAL ETHICS.

The court below holds, in substance, that an actual conflict unknown and necessarily unconsented to by the defendant — and unnoticed by the court responsible for creating the conflict — is of no legal consequence unless the defendant can prove that the conflict in fact injured his lawyer's representation of him. Under generally accepted ethics principles, on the other hand, in the absence of disclosure and the client's informed consent, "a lawyer *may not* represent a client if the representation would involve a conflict of interest." RLGL § 121 (emphasis supplied); *see also* MODEL RULES 1.7. ("A lawyer *shall not* represent a client if the representation of that client may be materially limited by the lawyer's [undisclosed] responsibilities to another client or to a third party." (emphasis supplied)). Surely these latter principles, for the reasons set forth below, provide the sounder rule for ensuring that clients receive the level of loyalty to which they are entitled.

### A. REQUIRING AN ADVERSE EFFECT ANALYSIS IS COUNTER-PRODUCTIVE BECAUSE IT COMPROMISES A CLIENT'S TRUST.

Client confidence is repeatedly cited as a central reason for a strict prohibition of conflicts of interest and that principle has constitutional implications. Instilling confidence is an objective important in itself because "mutual trust" is "necessary for effective representation," *State v. Jones*, 923 P.2d 560, 566 (Mont. 1996), for "[i]t is essential to our adversary system that a client's ability to communicate freely and in confidence with his counsel be maintained inviolate." *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977). A client's

distrust of his lawyer may become so severe that it alone may render the lawyer incapable of providing constitutionally adequate representation. *See Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970); *Romero v. Furlong*, 215 F.3d 1107 (10th Cir. 2000).

The ethical principle that bars a lawyer from engaging in a representation when the lawyer's undisclosed interests put the client at risk "seeks to assure clients that their lawyers will represent them with undivided loyalty," RLGL § 121 cmt. b. The assurance provided by the rules of ethics is intended "[t]o promote confidence between the accused and his attorney," *Zarychta v. State*, No. 14-99-00145 CR, 2001 Tex. App. LEXIS 1752, at *4 (Tex. Ct. App. Mar. 15, 2001).

A constitutional rule entitling defendants to representation free from undisclosed conflicts tends to bolster client confidence — a goal this Court has endorsed, *see Strickland v. Washington*, 466 U.S. 668, 690 (1984) — by giving defendants greater assurance that their lawyers have made full disclosure. A rule such as that contemplated by the *en banc* majority of the Court of Appeals — which puts the burden on a betrayed client to prove that the betrayal actually did him harm, and leaving unremedied conflicts of interest whose harm, though real, cannot be proved — can hardly be conducive to client trust.

By recognizing a right against covert conflicted representation, the state assures the defendant that it is "[his constitutional] prerogative . . . rather than [the prerogative of] his [conflicted] counsel to decide whether he [will] accept the risk that counsel's trial strategy [will be] devised not in his interest, but in the interest of [another]." *McDonald*, 496 N.E.2d at 849. As between the rule embraced by the *en banc* majority below and one recognizing a constitutional right to counsel free from undisclosed conflicts, the latter creates optimal conditions for the "mutual trust [that is] necessary to effective representation," *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977).



### B. Undisclosed Conflicts of Interest Systematically Create an Impoverished Record That Renders the Adverse Effect Analysis Useless.

If the decision at the *en banc* court below, requiring a showing of adverse effect even for undisclosed conflicts, is to be enshrined in Sixth Amendment jurisprudence, there will be an undeterminable number of injured defendants whose representation is adversely affected by counsel's conflict, but who are unable to *prove* that effect, and who in consequence are unable to secure a Sixth Amendment remedy. This approach contrasts sharply with the approach followed by other lower courts and by applicable rules of professional responsibility, that a defendant has a right to a lawyer who is untainted by undisclosed risk-imposing conflicts of interest.

A breach of loyalty may be apparent, but this Court and the lower courts have repeatedly recognized that the effects of a breach are not: "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. at 692. Other courts agree, observing that when a defense lawyer has a conflict of interest, "the prejudice may be subtle, even unconscious." *Castillo*, 504 F.2d 1245. Because a cold record cannot be expected to disclose "the erosion of zeal which may ensue from divided loyalty," *id.*, the *Castillo* Court refused to require that the defendant identify specific instances in which his lawyer's conflicting loyalties adversely affected his representation.

Numerous lower courts have concurred in this view.[6] Once a defendant has shown that his defense counsel had undisclosed interests that created a substantial risk of undermining the representation, and that the trial court failed to inquire into the manifest potential conflict, the better-reasoned lower court decisions have concluded that "[i]t is unfair to the accused, for who can determine whether his representation was affected, at least, subliminally, by the conflict." *People v. Stoval*, 239 N.E.2d 441, 444 (Ill. 1968);[7] *cf. Glasser v. United States*, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.").

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6. *See, e.g., United States v. Rogers*, 209 F.3d 139, 146 (2d Cir. 2000) ("[T]he sorting out of the conflict issues after trial entails findings that, even if they are sound enough to be sustained, represent intuitions about why some steps were taken and others forgone, and the impact of what happened. Inevitably, the post-trial inquiry opens avenues for undetected conflicts and constitutional harms that could be foreclosed at the outset by an informed waiver or a substitution of counsel."); *United States v. Malpiedi*, 62 F.3d 465, 470 (2d Cir. 1995) ("[A]fter-the-fact testimony by a lawyer who was precluded by a conflict of interest from pursuing a strategy or tactic is not helpful. Even the most candid persons may be able to convince themselves that they actually would not have used that strategy or tactic anyway, when the alternative is a confession of ineffective assistance resulting from ethical limitations."); *State v. Watson*, 620 N.W.2d 233, 236 (Iowa 2000) ("A cold, dispassionate appellate transcript simply cannot provide an adequate basis for assessing [defense counsel's] performance, for subtle variations in demeanor and depth of cross-examination cannot be reflected in the pages of a transcript.") (quoting *Zuck v. Alabama*, 588 F.2d 436, 440 (5th Cir. 1979)); *In re Richardson*, 675 P.2d 209, 214 (Wash. 1983) ("[T]o assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation."); *State v. Aguilar*, 536 P.2d 263, 264 (N.M. Ct. App. 1975) (quoting *Castillo*).

7. In declining to require that defendants demonstrate an adverse effect in addition to an undisclosed conflict, some courts go beyond evidentiary concerns; they suggest that, at least where a trial court has failed to inquire, there can be no harmless conflict. *See, e.g., U.S. v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995) ("Counsel's inability to make . . . a conflict-free decision is itself a lapse in representation.").



*In Young v. United States*, 481 U.S. 787 (1987), and *Wheat v. United States*, 486 U.S. 153 (1988), two cases that examine lawyer conflicts from different perspectives, this Court has endorsed disqualification when a trial court finds a conflict without requiring an adverse effect or other impact analysis. *See Young*, 481 U.S. at 812-13; *Wheat*, 486 U.S. at 164. In both cases, the Court found that the pervasive and insidious nature of conflicts made an adverse impact analysis impractical or impossible. In *Young*, this Court observed:

> Appointment of an interested prosecutor is also an error whose effects are pervasive. Such an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision. Determining the effect of this appointment thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are part of the record.

*Young*, 481 U.S. at 812-13. The *Young* Court was unwilling to apply either a harmless error analysis or to require proof of actual prejudice in the case of a non-disinterested prosecutor. [8]

In *Wheat*, the Court weighed the conflicting Sixth Amendment interests of conflict free counsel and a defendant's right to counsel of his choice. 486 U.S. at 159. This Court found that the trial court had not abused its discretion by declining Wheat's waiver of his lawyer's conflict. *Id.* at 164.

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8. It is not beside the point to note the irony that under the learning in *Young*, Saunders, as Hall's lawyer, could never have been appointed a special prosecutor of Mickens. If that is so then, a fortiori, Saunders should not be able to represent Mickens. At least in the former case Saunders would have been on the same side of the matter, if you will, pressing charges against a person who allegedly victimized his client. His sympathies would naturally be with the prosecution and, indeed, it is concern about how strong those sympathies might be that would lead to the disqualification of the lawyer for the vicitm. But to ask that same lawyer, in effect, to switch sides is likely to have an even more unfortunate effect on the integrity of the representation than that which animated the Court in *Young*.

In contrast to the present case, the *Wheat* Court was balancing two important Sixth Amendment rights. Nevertheless, it concluded that proof of a mere potential conflict could demand disqualification. The present circumstances are all the more compelling.

The injurious effects of a lawyer's external interests tend to defy detection and measurement; only by prohibiting the nonconsensual imposition on a client of a substantial risk of those effects can courts weed out unconstitutional convictions.

### C. Even if the Approach to Conflicts of Interest Embodied in the Law Governing Lawyers Is Not Applied More Generally in Ineffective Assistance Cases, It Is Clearly Appropriate In the Particular Circumstances of This Case.

Any conclusion about the proper remedial approach to a conflict of interest in any event should not place any burden to prove adverse effect on a client who endured an undisclosed conflict. When a conflict is disclosed — for example when the client objected but relief was denied — the client is at least on notice of the facts that gave rise to the request for different counsel, will view his lawyer's conduct through that prism, fully aware of the potential burden under which the lawyer is operating, and can document for later use those decisions and actions that the client believes may have been infected by the conflict. So, too, a court that either denied disqualification or knows of the denial can be alert to how the affected lawyer handles the defense and will retain the right of disqualification. While such opportunities are hardly a substitute for a correct initial decision on whether a lawyer should have been disqualified, they do highlight a major difference between cases in which the conflict was disclosed and ones in which it was not.

Where the conflict is hidden, the client assumes that he or she is receiving representation predicated on undivided loyalty. The client perceives a relationship characterized by trust and confidence. As a result the client will have no reason to be alert to possible problems. When the conflict of interest is



finally disclosed, any attempt to reconstruct the effects of the conflicted representation will be impaired dramatically by the false sense of security induced by the non-disclosure.

Thus, the undisclosed conflicts case is even worse than the situation brought to the Court in *Holloway v. Arkansas*, 435 U.S. 475 (1978). In both situations, the conflict of interest produces an impoverished record, but in the undisclosed conflict situation, the defendant is helpless to mitigate the effect. It follows that placing the burden of proving adverse effect on Mickens subjects him to a harsher standard, even though he is in a more vulnerable position.

## IV. Even if the Court Concludes That an Adverse Effect Analysis Is Required, the Court Should Still Grant Reflief Because the *En Banc* Opinion Is Fundamentally Flawed.

The *en banc* majority assumes arguendo that Saunders was burdened by an actual conflict, but then concludes that it is of no moment because Mickens was unable to establish an adverse effect. *See Mickens v. Taylor*, 240 F.3d 348, 358 (4th Cir. 2001) (*en banc*). The court concluded there was no adverse effect because the information Saunders knew was irrelevant to Mickens' defense, which was based on the assertion that Mickens was not the perpetrator. *See id.* at 361.

This proposition, however, cannot be used to analyze the propriety of Saunders' conduct because it is, itself, tainted with the conflict. Once it is assumed that Saunders was burdened with the conflict, it also must be assumed that every decision made by Saunders is suspect and cannot be trusted.[9] That includes the defense strategy itself.

First, a lawyer, unaffected by the conflict of interest, would certainly have considered with his client trying a different defense. Indeed, it is a lawyer's obligation to explore all the alternatives. This is especially true when the result of a bad judgment is not a client paying money she does not owe

9. This obviousness of the adverse effect in the instant litgation is all the more surprising because of the systematic tendency of a conflict of interest to hide and de-emphasize the effect. *See supra*, pp. 18-21.

or serving a prison sentence for a crime he did not commit, but a sentence of death.

Second, even if a client, guided by a lawyer, chooses the "I didn't do it" defense, he still must be free to challenge the prosecution's case for failure to prove the alleged crimes beyond a reasonable doubt. Here, this would include introducing evidence about the victim at the guilt phase of the case — for example, to demonstrate that the perpetrator may have been acting in self-defense, given Hall's propensity for violence and known possession of weapons, or that this was not a capital crime because the alleged sodomy itself was consensual, and therefore, whoever perpetrated the crime would not be eligible for the death penalty.

Even if all of the foregoing had left the defense taking the same approach Saunders in fact took at the guilt phase of the proceeding, it does not follow that the information about Hall would not have been critical to the penalty phase. On this point the *en banc* majority asserts that none of the information would have been relevant because the approach taken was sympathy for the victim's family. *See Mickens*, 240 F.3d at 362. But that was the approach chosen by a lawyer who had no choice because of his conflict and by a client who did know he had a choice. If the prosecution was going to be free to offer Hall's mother's testimony to explain her grief at losing her son to help the jury see its way clear to sending Mickens to his death, then the defense had to be free to conduct the investigation that would prepare it to employ a strategy that asserted that a) she was not credible and b) in any event, whether or not Hall's mother testified, the victim was not quite as worthy of the jury's sympathy as the prosecution's presentation would indicate.

Because Saunders labored under a conflict, any adverse effect analysis cannot rest on a facial determination of whether, absent a conflict, Saunders' choices were correct or even reasonable. Rather, an adverse effect analysis must begin with a blank slate and ask the question: did the lawyer make choices in his client's best interest or did the conflict adversely affect those choices? In the present case, Saunders made a series of choices that were based on Saunders' divergent interests and not on what was best for Mickens.



## CONCLUSION

> The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case.

*Emle Industries v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973).

These quoted words sum up *amici's* argument. It is *amici's* position that while the case of Walter Mickens does not present a close question on the need to grant relief from the conflict of interest he suffered, the way this Court crafts the grant of relief can go a long way toward making the constitutional guarantee of effective assistance of counsel embody the principles of the rules governing the professional responsibility of lawyers. And if that is done, not only will Mickens' injuries be remedied, but also the Court will bolster public confidence in the fairness of our system of justice.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

WALTER MICKENS, JR.,

*Petitioner*,

*vs.*

JOHN B. TAYLOR,
Warden, Sussex I State Prison,

*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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## QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?

2. Would an affirmative answer to Question 1 be a new rule within the meaning of *Teague* v. *Lane*?

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IN THE

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WALTER MICKENS, JR.,

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JOHN B. TAYLOR,
Warden, Sussex I State Prison,

*Respondent*.

---

**BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT**

---

## INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This Court's jurisprudence on attorney conflicts has established a compromise position, where a defendant who made no objection at trial is relieved of the normal burden of showing prejudice but must meet the lesser burden of showing

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

adverse effect. Petitioner's proposed rule in this case would not only change that rule but do so retroactively on habeas corpus, thereby overturning final judgments decided in accord with current law. To overturn such judgments for defense attorney malfeasance which had no effect on the outcome would be contrary to the interests of victims and society CJLF was formed to protect.

## SUMMARY OF FACTS AND CASE

Nine years ago, Walter Mickens murdered Timothy Hall, who was then 17, by stabbing him to death. There were "143 separate 'sharp force injuries' to the victim's body." *Mickens* v. *Commonwealth*, 247 Va. 395, 399, 442 S. E. 2d 678, 682 (1994). Hall was last seen alive on March 28, 1992, and his body was discovered March 30, 1992. *Id.*, at 398-399, 442 S. E. 2d, at 681-682. Although he denied committing the crime at trial, J. A. 45, Mickens' identity as the killer was established by, among other evidence, his knowledge the victim had been stabbed, his express statement to the police he was guilty, his possession and sale of the victim's tennis shoes, and DNA analysis of semen from the scene. The DNA evidence, while not conclusive by itself, was powerfully corroborating in light of the other evidence. See 247 Va., at 400-401, 442 S. E. 2d, at 682.

Shortly before his death, Hall was the subject of juvenile court petitions as a result of a scuffle with his mother and his possession of a bread knife wrapped in newspaper. J. A. 391-394. Attorney Bryan Saunders was appointed to represent him. J. A. 396. On April 3, 1992, the juvenile case was dismissed due to Hall's death. J. A. 390.

On April 1, 1992, two days after discovery of the body, the local newspaper printed a story about Timothy Hall. J. A. 397-398 (copy of article); J. A. 168 (date). The article discusses the rumors that Hall was a male prostitute, the fact he lived at a friend's house rather than with his mother, the incident with his



mother and the resulting charges, and the concealed weapon allegation, erroneously referring to the latter as involving a gun rather than a knife. J. A. 397-398.

Attorney Saunders was appointed to represent Mickens, along with co-counsel Warren Keeling. "Saunders never told Mickens or Keeling that he had represented Hall . . . ." *Mickens* v. *Taylor*, 240 F. 3d 348, 354 (CA4 2001) (en banc). Keeling was primarily responsible for investigating the sentencing-phase issues. J. A. 172-173. He was aware of the newspaper article. J. A. 168.

In the penalty phase, the prosecution introduced Mickens' extensive criminal record, including two convictions of sodomy and four other felonies. Two of Mickens' surviving victims testified. Charles Siron testified that Mickens forcibly sodomized him in the city jail while holding a razor blade to his throat. Elementary school teacher Ruby Bunn testified that Mickens robbed her in her classroom by threatening a small child with a knife. 247 Va., at 410, 442 S. E. 2d, at 688. Mickens was sentenced to death, and the Virginia Supreme Court initially affirmed. *Id.*, at 412, 442 S. E. 2d, at 689. This Court vacated and remanded "for further consideration in light of *Simmons* v. *South Carolina*, 512 U. S. 154 (1994)." *Mickens* v. *Virginia*, 513 U. S. 922 (1994). The Virginia Supreme Court remanded for a second penalty trial. *Mickens* v. *Commonwealth*, 249 Va. 423, 457 S. E. 2d 9 (1995). The second jury reached the same conclusion, and its verdict was affirmed. *Mickens* v. *Commonwealth*, 252 Va. 315, 478 S. E. 2d 302 (1996). Mickens filed a state habeas petition, prepared by new counsel. J. A. 103-125, 133. The Virginia Supreme Court denied it. J. A. 126.

On federal habeas corpus, Mickens raised the conflict issue for the first time. The District Court found he had cause for the default and that "the prejudice inquiry incorporates the test for the underlying claim." *Mickens* v. *Greene*, 74 F. Supp. 2d 586, 602 (DC ED Va. 1999).

The District Court held an evidentiary hearing, including testimony by both defense counsel. J. A. 155-253. The court found "that Saunders did not learn any confidential information from Hall that was **relevant** to Mickens' defense either on the merits or at sentencing." 74 F. Supp. 2d, at 606 (emphasis in original), J. A. 291. Further, "the Court credits Saunders' testimony that he did not refrain from taking any actions for Mickens because of his earlier representation of Hall." *Id.*, at 612, J. A. 303. The District Court denied the conflict claim, finding neither actual conflict, adverse effect, nor prejudice to excuse the default. *Id.*, at 615, J. A. 309.

On Mickens' related ineffective assistance of counsel claim, the District Court held it was both defaulted and meritless. "In light of the facts facing counsel . . . , counsel reasonably chose not to pursue a consent defense. Furthermore, the lack of mitigating evidence is attributable to the absence of such evidence rather than the failings of counsel." *Id.*, at 598, n. 6, J. A. 275.

A divided panel of the Court of Appeals reversed, finding that under *Wood* v. *Georgia*, 450 U. S. 261 (1981), no showing of an adverse effect is required in these circumstances. *Mickens* v. *Taylor*, 227 F. 3d 203, 210-211 (CA4 2000), J. A. 327-329. The en banc court disagreed, 240 F. 3d, at 360, J. A. 371-372, and reinstated the District Court decision. This Court granted Mickens' petition for certiorari on April 16, 2001.

## SUMMARY OF ARGUMENT

*Nix* v. *Whiteside* establishes that the boundaries of the Sixth Amendment right to unconflicted counsel are not coextensive with professional norms. Instead, those norms mark an outer limit. A set of facts that does not constitute a conflict under professional norms does not violate the Sixth Amendment, but the converse is not necessarily true.



Duty to former clients is much more limited than duty to present clients under those norms. The continuing duty is to preserve confidential information, which is defined to exclude information that has since become public. There was no conflict in this case.

*Teague* v. *Lane* applies to this case and is fairly included in the question presented. *Caspari* v. *Bohlen* holds that a certiorari petitioner preserves the *Teague* issue by arguing it in the body of the certiorari petition. Argument in the body of the brief in opposition is therefore sufficient for the certiorari respondent.

Surveying the legal landscape, *Cuyler* v. *Sullivan*, *Strickland* v. *Washington*, *Burger* v. *Kemp*, and *Burden* v. *Zant* establish that an adverse effect must be shown by the habeas petitioner in the circumstances of the present case. *Wood* v. *Georgia* was a decision on an unargued, unbriefed point, which merely omitted discussion of an element not separately disputable on the facts of the case.

Where, as here, pertinent Supreme Court precedents state a rule which, on its face, applies to the present case, an argument that nuances of other cases create an unstated exception is *per se* a proposal for a "new rule" within the meaning of *Teague*.

## ARGUMENT

### I. Petitioner has received a full hearing on his conflict claim and failed to show any actual conflict.

*A. The Role of Prevailing Norms.*

The first question to be addressed is what role prevailing professional norms play in a Sixth Amendment conflict analysis. The *amici* who style themselves the "legal ethicists" contend, in essence, that every breach of prevailing professional norms should be deemed a violation of the Sixth Amendment and result, without more, in successful collateral attack on final

judgment in a criminal case. See Brief for Legal Ethicists *et al.* as *Amici Curiae* 17 (cited below as "Legal Ethicists' Brief"). However, this Court has already duly considered and unequivocally rejected this notion.

> "Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel. When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." *Nix* v. *Whiteside*, 475 U. S. 157, 166 (1986).

Not only is the position of the "legal ethicists" not dictated by precedent in this habeas case, see *Lambrix* v. *Singletary*, 520 U. S. 518, 529 (1997), the exact opposite is dictated by precedent.

The rules governing whether conduct is ethical and the rules governing when final judgments will be set aside differ for good reason. The rules of professional ethics operate prospectively. Their goal is to tell lawyers in advance what they may and may not do in order to prevent or at least minimize the possibility of future harm. This is a fundamentally different purpose from that of a remedial system designed to correct or compensate for harms that have already occurred.

By analogy, the prohibition against driving while intoxicated is a preventative rule. It prohibits an action which creates a danger of harm even though it is not inherently harmful. A person who violates that prohibition may be punished, even though he makes it home without hurting anyone. The remedial system comes into action if and only if the drunk driver actually causes harm. Then a private person will have an action for damages against the driver and the owner of the car, and in



most cases the car's insurer is the one who actually pays. Actual harm creates both the private right of action, as opposed to a public prosecution, and widens the net to persons other than the malefactor.

*Amici* supporting petitioner protest the lack of "legal consequence" if a conflict causing no harm does not result in the setting aside of this final judgment. See Legal Ethicists' Brief 17. Not so. Attorneys who breach the rules without causing harm, like drunk drivers who do not cause accidents, are subject to public prosecution, *i.e.*, bar discipline. For a private party, the client, to obtain redress from the state, which is not the malefactor, actual harm should be shown.

The Court in *Nix* v. *Whiteside* nonetheless went on to examine professional norms, employing them as marking the outer boundary of possible Sixth Amendment requirements. "Since there has been no breach of any recognized professional duty, it follows that there can be no deprivation of the right to assistance of counsel under the *Strickland* standard." 475 U. S., at 175. If the present case involves no conflict under prevailing norms, then there is no conflict violating the Sixth Amendment, although the converse is not necessarily true.

*B. No Actual Conflict.*

*Amici* supporting petitioner insist that trial counsel had an actual conflict of interest as a result of his prior, brief representation of the murder victim in an unrelated matter, independently of whether any confidential information is involved. See Legal Ethicists' Brief 13. This argument glosses over the distinction between current and former clients. *Amici*'s premise is that a lawyer has a continuing duty of loyalty to former clients not to bring out information damaging to their reputation, even if that information is unrelated to the prior representation and independent of any confidential communication. This premise is false.

The American Bar Association Model Rules of Professional Conduct (2001 ed.) (cited below as "Model Rules") have separate rules for present and former clients. The differences are significant:

"Rule 1.7 CONFLICT OF INTEREST: GENERAL RULE

"(a) A lawyer shall not represent a client if the representation of that client will be *directly adverse to another client*, unless:

"(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

"(2) each client consents after consultation.

"(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

"(1) the lawyer reasonably believes the representation will not be adversely affected; and

"(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved." *Id.*, Rule 1.7, at 24-25 (emphasis added, footnote omitted).

"RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

"(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person *in the same or a substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

[(b) omitted]



"(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

"(1) *use information relating to the representation to the disadvantage of the former client except* as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or *when the information has become generally known*; or

"(2) *reveal information relating to the representation* except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client." *Id.*, Rule 1.9, at 32-33 (emphasis added, footnote omitted).

Rule 1.7(a) establishes a general duty of nonadversity for present clients. In sharp contrast, Rule 1.9 limits the duty regarding former clients to the "same or substantially related matter." The Restatement is in accord. See 2 American Law Institute, Restatement (Third) of the Law Governing Lawyers § 132, pp. 376-377 (2000). The forcible sodomy and brutal murder of Timothy Hall by Walter Mickens is not "substantially related" to the allegations that Hall previously shoved his mother and wrapped a bread knife in newspaper. Trial counsel Saunders was therefore partially correct when he stated that his duty to Hall ended with Hall's death and the dismissal of the charges against him.

As *amicus* Deborah Rhode puts it,

"In general, this personal loyalty to current clients ends when the representation ends. If lawyers were unable to accept new matters adverse to past as well as current clients, the rules would be unworkable. . . . Thus, it is often said that the rules governing simultaneous representation of conflicting interests are based on loyalty and confidentiality, while the rules governing successive representation are based on confidentiality alone." D. Rhode & D. Luban, Legal Ethics 518 (2d ed. 1995).

The only *potential* conflict lay in the continuing duty to preserve client confidences under Rule 1.9(c). This is where the evidentiary hearing in the habeas court comes in.

Like other ineffective assistance issues, conflict issues normally cannot be decided on the appellate record. That is why they are typically determined on collateral review, with an evidentiary hearing. Such a hearing was held in this case. The case is not to be decided on a cold appellate record, drained of content by the very alleged conflict at issue. Cf. Brief for Petitioner 45. This case is to be decided after a full evidentiary hearing with the opportunity to summon and present witnesses.

Trial counsel testified and the District Court found that no pertinent confidential information is involved in this case. See *Mickens* v. *Greene*, 74 F. Supp. 2d 586, 606 (DC ED Va. 1999), J. A. 290-291. The requirement of confidentiality does not preclude the use of "information relating to a former client that is in the 'public domain . . . .' " Model Rules, *supra*, at 35; accord Restatement, *supra*, § 132(2), at 377 ("unless that information has become generally known"). The information adverse to Hall's reputation had been printed in the local newspaper, see *supra*, at 2, and it is difficult to get more "public" than that. Petitioner insists that counsel was ethically forbidden to investigate based on formerly confidential leads when the essence of the information had since been printed in the newspaper. Brief for Petitioner 44. Under prevailing norms there is no such ethical constraint and hence, under *Nix* v. *Whiteside*, *supra*, no Sixth Amendment conflict.

Undoubtedly, trial counsel in this case demonstrated an ethical tin ear. The proper course was to disclose the facts to both defendant and the court, make a record that no actual conflict existed, and permit defendant to request different counsel if he had any doubts of Saunders' loyalty. See 74 F. Supp. 2d, at 601. Yet even a tone deaf musician can strike a correct chord occasionally. Saunders blundered his way to the correct conclusion that no actual conflict existed in this case.



## II. *Teague* applies to this case and is fairly included in the question presented.

The question presented in this case is, "Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?" *Mickens* v. *Taylor*, 532 U. S. __, 149 L. Ed. 2d 467, 121 S. Ct. 1651 (2001). The issues to be considered by the Court are therefore limited to this question and those "fairly included therein." See Supreme Court Rule 14.1(a).

The nonretroactivity principle of *Teague* v. *Lane*, 489 U. S. 288 (1989) is "fairly included therein." "A *threshold* question in *every* habeas case . . . is whether the court is obligated to apply the *Teague* rule to the defendant's claim." *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994) (emphasis added). Arguing nonretroactivity in the body of the argument at the petition stage is sufficient to preserve the issue even for the certiorari petitioner. *Id.*, at 389-390. *A fortiori*, it is sufficient for the certiorari respondent, see Brief in Opposition 24-25, 28-29 (retroactivity argument), who has broader latitude to defend rather than attack the judgment below. See *Schenck* v. *Pro-Choice Network*, 519 U. S. 357, 384, n. 12 (1997).

For the reasons stated in part III, *infra*, and in respondent's brief, this Court's precedents make the question presented straightforward even on a *de novo* basis. (That is, the answer is "no.") However, the answer is even clearer under *Teague*, because the Court need only ask what the rules were in 1997, not the always-debatable question of whether they should be changed. The *Teague* rule has been criticized as complicating the habeas court's task, see, *e.g.*, Lay, The Writ of Habeas Corpus: A Complex Procedure for a Simple Process, 77 Minn. L. Rev. 1015, 1042 (1993), but the complications come primarily from attempts to evade the rule. The principle simply is that any pushing of the legal envelope must be done on direct

review. So, too, must resolution of conflicts where multiple, well-considered decisions are divided. See *Caspari* v. *Bohlen*, 510 U. S., at 395. Habeas is strictly for enforcement of existing rules. The *Teague* issue is clear whenever the underlying question is close, as well as when the underlying question is clear in the state's favor. See *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000) (noting equivalence of *Teague* "old rule" with "clearly established" under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")). Both *Teague* and the AEDPA's similar rule of 28 U. S. C. § 2254(d) will usually make it unnecessary to decide the underlying question. As soon as the habeas court determines that the proposed rule would be "new" or is not "clearly established," or that a state court's application of an old rule is "reasonable," its task is finished. See *Teague*, 489 U. S., at 316; *Penry* v. *Johnson*, 532 U. S. __, 150 L. Ed. 2d 9, 23-24, 121 S. Ct. 1910, 1919 (2001) ("We need not and do not decide . . ."). Properly applied, *Teague* and § 2254(d) streamline rather than complicate the habeas process. See *Williams*, *supra*, at 404 (congressional purpose "to curb delays").

Despite the considerable overlap between *Teague* and § 2254(d), *Teague* survives as an independent limitation on the habeas remedy. Some early post-AEDPA writings of the opponents of habeas reform postulated that *Teague* had been supplanted. See, *e.g.*, Liebman & Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of the Federal Courts, 98 Colum. L. Rev. 696, 866 (1998). That was wishful thinking on their part. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 959, n. 500 (1998).

In particular, the *Teague* rule applies and has independent force where there has been no state court decision on the merits of the claim, and hence § 2254(d) is inapplicable. Most such claims are either unexhausted or procedurally defaulted, but in a few cases they may be decided on *Teague* grounds. *Teague* was applied in the post-AEDPA case of *Breard* v. *Greene*, 523



U. S. 371, 376-377 (1998) (*per curiam*), to reject a claim when petitioner contended that the novelty of the claim excused his default. Occasionally it may be more efficient to dispose of a defaulted claim on *Teague* grounds when the default issue presents difficult questions while the *Teague* issue is straightforward. See *Lambrix* v. *Singletary*, 520 U. S. 518, 525 (1997). *Teague* can also preclude a defaulted claim where the "cause and prejudice" exception to default has been met.

In the present case, the Court of Appeals found the "cause" element established. *Mickens* v. *Taylor*, 240 F. 3d 348, 356 (CA4 2001) (en banc). The court then held that if petitioner could qualify for the Sixth Amendment "presumption of prejudice" by establishing both actual conflict and adverse effect, that presumption would carry over to the prejudice prong of the procedural default analysis. *Id.*, at 357. Since that issue is not fairly included in the question presented, *amicus* will not address it. It is sufficiently knotty to bring this case within the rationale of *Lambrix*, invert the usual order of decision, and dispose of this *Teague*-barred claim on *Teague* grounds rather than procedural default.

> "In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must '[s]urve[y] the legal landscape as it then existed,' [citation] and 'determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution,' [citation]. Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle." *Bohlen*, 510 U. S., at 390 (alterations in *Bohlen*).

The date of finality is October 14, 1997. See *Mickens* v. *Virginia*, 520 U. S. 1269 (June 9, 1997) (denying certiorari on direct appeal), reh'g denied, 522 U. S. 928 (Oct. 14, 1997); *Bohlen*, *supra*, at 390 ("final" when certiorari "finally denied"); *Missouri* v. *Jenkins*, 495 U. S. 33, 46 (1990) (judgment not final while rehearing petition pending, in a different context).

In part III, *infra*, we will briefly survey the legal landscape, deferring to respondent's brief for a more thorough discussion of the merits. In part IV, we propose a bright-line rule for resolving the *Teague* question in cases such as this one. The narrow exceptions are obviously inapplicable.[2]

## III. Pertinent Supreme Court precedent squarely states an adverse effect requirement.

From the ethical standards quoted and discussed in part I, *supra*, it is evident that concurrent representation of multiple defendants in the same case presents a far greater danger of conflict of interest than prior representation of the victim of a crime in an entirely unrelated matter. As the commentary to the Restatement notes, "joint representation in criminal cases *often* has a material and adverse effect on the representation of each defendant . . . ." 2 American Law Institute, Restatement (Third) of the Law Governing Lawyers, § 129, Comment *c*, p. 351 (2000) (emphasis added). In contrast, a prominent capital defense advocate notes that only rarely is it even possible to impugn the character of the victim. See Coyne, Inflicting *Payne* on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases, 45 Okla. L. Rev. 589, 614 (1992). Even where it is possible, such an attack will

2. Petitioner's proposed rule would not legalize murder and forcible sodomy. A rule overturning convictions for a defect that had no effect whatever on the outcome does not implicate the fundamental fairness and accuracy of the criminal proceeding, at least not in a positive direction. Cf. *Bohlen*, *supra*, at 396.



typically be strategically unwise due to its potential to alienate the jury. See Wallace, The Ethical Considerations of Defense Strategies When Confronted With Victim-Impact Statement—Give Us Dirty Laundry?!, 13 Thomas M. Cooley L. Rev. 991, 1012 (1996).

Sequential representation of the victim and perpetrator in unrelated matters, therefore, would only rarely have a material and adverse effect on representation. Where the lawyers have no relevant, confidential, nonpublic information from the former client, as in this case, there is no conflict at all. Where the lawyers do have such information, the only effect is that they cannot use it, see Restatement, *supra*, § 132, Comment *f*, Illustration 6, at 383, which is the same as having a lawyer who does not know the information.

Certainly it is objectively reasonable to believe that there is no greater burden on the trial court and no lesser showing required of the defendant in the sequential representation situation than there is in the concurrent representation situation. A weak argument could be made for such a differential based on the fact that common defense sometimes has a benefit, see *Burger* v. *Kemp*, 483 U. S. 776, 783-784 (1987), but no such subclassification of types of conflict is even intimated by, much less "dictated" by, this Court's precedents. Applying the concurrent representation precedents at face value to the sequential representation situation cannot be considered objectively unreasonable.

*Cuyler* v. *Sullivan*, 446 U. S. 335 (1980) held in part IV A, "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.*, at 347. Concurrent representation alone is not enough, and sequential representation is even less. Specifically, if the possibility inherent in every criminal case of inconsistent defenses of co-defendants is not enough to trigger the duty of inquiry, then the much lesser possibility of putting the dead victim on trial in a capital case cannot be. *Sullivan* then held in part IV B that "a defendant who raised no objection at trial must

demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.*, at 348. The condition stated for this requirement is lack of objection. The only reference to trial court inquiry in part IV B comes in a footnote accompanying this statement. The Court cited seven Court of Appeals cases as consistent with its holding, followed by a "cf." cite to a case holding "burden of proof shifts when trial court fails to inquire into possibility of conflict." The "cf." signal indicates that this case is at variance with the Court's holding. *Sullivan* does not hold that finding a trial court duty to inquire obviates the adverse effect requirement. Its rule is stated in broader terms, and subsequent cases confirm that breadth.

*Wood* v. *Georgia*, 450 U. S. 261 (1981) is the mainstay of the argument that the law has changed since *Sullivan*, or, alternatively, that *Sullivan* contains an unstated exception to its plainly stated rule. See Brief for Petitioner 29. *Wood* is an unlikely candidate to carry such a burden.

In *Wood*, the defendants were low-level employees of a pornographic theater and affiliated bookstore. See 450 U. S., at 263-264, and n. 3. They were fined thousands of dollars. *Id.*, at 263. The employer provided the defense counsel, and the employees expected the employer to pay the fines, but it did not. *Id.*, at 264, 266-267. As they were unable to pay themselves, their probation was revoked, and they were ordered to jail. *Id.*, at 264, and n. 2. The Court held that in this case, unlike *Sullivan*, the potential of conflict was strong enough to create a duty in the trial court to inquire. There was a powerful and apparent danger that the employer's interest in a test case directly collided with the employees' interest in leniency. *Id.*, at 270. The Court vacated and remanded for an actual conflict inquiry. *Id.*, at 272-274. Actual conflict and adverse effect are not separately discussed. The opinion implies that on the facts



of the case the two inquiries are intertwined. See *id.*, at 271-272.[3]

Justice White objected to the manner in which the Court reached the conflict issue, believing that the Court lacked jurisdiction over it.

> "The Court apparently believes that under *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), the possibility of a conflict of interest of constitutional dimensions should have prompted further inquiry by the trial judge. But *Cuyler* v. *Sullivan* did not purport to give this Court jurisdiction over a claim otherwise beyond its reach. *Cuyler* held only that if a trial court 'reasonably should know that a particular conflict exists,' *id.*, at 347, then a failure to initiate an inquiry may constitute a Sixth Amendment violation. If this is the case here, then petitioners remain free to seek collateral relief in the lower courts." *Id.*, at 280 (dissenting opinion).

In response to this objection, the Court dropped this footnote:

> "18. Justice White's dissent states that we have gone beyond the recent decision in *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980). Yet nothing in that case rules out the raising of a conflict-of-interest problem that is apparent in the record. Moreover, *Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' *Id.*, at 347." *Id.*, at 272, n. 18 (emphasis in original).

In context, this footnote says nothing at all about the requirement of an adverse effect for an overturning of a criminal judgment. That prerequisite was not the basis of the dissent's objection, and hence there was no need to discuss it.

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3. The existence of an adverse effect can be a factor in determining whether there is a conflict, see, *e.g.*, Model Rules, Rule 1.7(b)(1), at 25, and hence the two inquires may be intertwined.

On the facts of *Wood*, the adverse effect was obvious once the conflict was determined to be an actual one. There was no doubt that the employees were given fines far in excess of their ability to pay, and if the attorney had a conflict inhibiting his freedom to argue for leniency there was nothing more to establish.

If the *Wood* footnote were interpreted to say that *Cuyler* v. *Sullivan* mandates overturning a criminal judgment and ordering a new trial for failure to make an inquiry with nothing more, that statement by *Wood* would be manifestly wrong. *Sullivan* said nothing of the sort. *Sullivan* held that there was no duty to inquire in that case. The inquiry discussion properly ends with that holding. See 446 U. S., at 348.

Some indication of whether a case changes the law may be gleaned from the manner in which the Court decides it. In *Lambrix* v. *Singletary*, 520 U. S. 518 (1997), there was an argument that *Espinosa* v. *Florida*, 505 U. S. 1079 (1992) (*per curiam*) could not be a new rule because it was decided summarily. See *Lambrix*, at 538-539. The Court did not deny that such an inference might generally have some weight, but it was not applicable to *Espinosa*, because the identical issue had been fully briefed and argued in another Florida case.[4] See *ibid.* *Wood* is the mirror image of *Espinosa*. Although *Wood* was a fully briefed and argued case, it was briefed and argued on an entirely different point. On the point actually decided, the Court was "without the benefit of briefing and argument." 450 U. S., at 272. As precedent, *Wood* should be regarded with the same skepticism as a summary decision. See *Hohn* v. *United States*, 524 U. S. 236, 251 (1998) (noting reduced

4. *Teague* itself is a variation on the same theme. The adoption of Justice Harlan's view of retroactivity was fully briefed, indeed proposed, by counsel for Teague, albeit in relation to a different issue. See *Teague* v. *Lane*, 489 U. S. 288, 300 (1989); Brief for Petitioner in *Teague* v. *Lane*, No. 87-5259, pp. 21-32.



precedential force when "the opinion was rendered without full briefing or argument").

New rules are occasionally made in summary decisions. *Cage* v. *Louisiana*, 498 U. S. 39 (1990) (*per curiam*), disapproved in part in *Estelle* v. *McGuire*, 502 U. S. 62, 72, n. 4 (1991), is the most prominent example. See *Tyler* v. *Cain*, 533 U. S. __, 150 L. Ed. 2d 632, 642, 121 S. Ct. 2478, 2482 (2001). It would be fair to say that new rules *should* not be made in summary decisions, although they sometimes are. If a summary decision appears to plow new ground, cf. *Teague*, 489 U. S., at 301, we must look to later cases to see whether anything grew in that furrow.

*Strickland* v. *Washington*, 466 U. S. 668 (1984) is the Court's most extensive and comprehensive discussion of when the shortcomings of counsel require reversal of a criminal judgment. See *id.*, at 671. *Strickland*'s analysis of the conflict cases bears directly on the question in this case and is worth quoting in full and in its surrounding context.

> "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States* v. *Morrison*, 449 U. S. 361, 364-365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.
>
> "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States* v. *Cronic*, *ante*, at 659, and n. 25. Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the

cost. *Ante*, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

"One type of actual ineffectiveness claim warrants a similar, *though more limited*, presumption of prejudice. In *Cuyler* v. *Sullivan*, 446 U. S., at 345-350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and *the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts*, see e.g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, *the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above*. Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' *and* that 'an actual conflict of interest *adversely affected* his lawyer's performance.' *Cuyler* v. *Sullivan*, *supra*, at 350 (footnote omitted).

"Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Id.*, at 691-693 (emphasis added).

*Strickland* thus establishes a carefully constructed three-tier system based on the degree of the state's responsibility and the difficulty of showing adverse effect or prejudice. The first tier, requiring no showing at all, is reserved for direct state interference or violation of the clear and simple duty to appoint counsel. Conflicts generally are included in the second tier. There is no subdivision into cases where the trial court did or



did not have a duty to inquire further. The ability to inquire is expressly noted as the reason for reducing the normal "prejudice" showing down to the lower hurdle of adverse effect. The difficulties of proof are also cited as a reason for reducing, not eliminating, the defendant's burden of proof. Although this passage is arguably dictum, as *Strickland* is not a conflict case, it illustrates the Court's understanding of the different types of Sixth Amendment claims and the showing needed for each. This understanding was recently reiterated in *Smith* v. *Robbins*, 528 U. S. 259, 287 (2000).

*Burger* v. *Kemp*, 483 U. S. 776 (1987) applied the adverse effect requirement to a case where the potential for conflict was comparable to that in *Wood* and far stronger than the present case. *Burger* was a two-defendant capital murder case in which "each of the two defendants sought to emphasize the culpability of the other in order to avoid the death penalty." *Id.*, at 781. Two law partners were appointed to represent the two defendants in separate trials, *ibid.*, and the Court decided the case on the assumption that "two law partners are considered as one attorney" for conflict purposes. *Id.*, at 783; see also American Bar Association, Model Rules of Professional Conduct, Rule 1.10(a), p. 36 (2001 ed.).

The *Burger* Court does not ask or answer the question of whether the trial court had a duty to inquire *sua sponte* into the potential conflict. Instead, the Court rejects a blanket presumption of prejudice and requires a showing of both actual conflict and adverse effect. *Burger*, *supra*, at 783 (citing *Cuyler* v. *Sullivan* and *Strickland*). On this point, the Court was unanimous among the eight Justices who expressed an opinion.[5] The dissent concluded that the trial court did err in failing to inquire, *id.*, at 810 (Blackmun, J., dissenting), but nonetheless agrees that defendant did have to show an adverse effect. The dissent disagrees only with the application of the standard to the facts

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5. Justice Powell did not address the conflict question. See *id.*, at 817-818 (dissenting opinion).

of the case, not with the statement of the standard. See *id.*, at 799, 809-810.

*Burger* makes clear that six years after *Wood*, the two-part *Cuyler* v. *Sullivan* standard applied to all claimed conflicts in the absence of an objection at trial, without regard to whether the trial court had a duty to inquire *sua sponte*.

The First Circuit in *Brien* v. *United States*, 695 F. 2d 10, 14-15, 20 (1982) applied *Cuyler* v. *Sullivan* and required an adverse effect, rejecting a broader interpretation of *Wood*. See *id.*, at 15, n. 10. *Amicus* Charles W. Wolfram states that *Brien* is a "common approach" to defining the burden. C. Wolfram, Modern Legal Ethics § 8.2, p. 415 (1986). Although a single opinion does not necessarily render an interpretation of this Court's precedents objectively reasonable, see *Williams* v. *Taylor*, 529 U. S. 362, 410 (2000), a widespread interpretation does, and it is error to resolve conflict with such an interpretation in the habeas petitioner's favor. See *Caspari* v. *Bohlen*, 510 U. S. 383, 395 (1994).

In *People* v. *Bonin*, 47 Cal. 3d 808, 837-838, 765 P. 2d 460, 476 (1989) Justice Mosk, writing for the California Supreme Court, interpreted *Wood* and *Strickland* to require an adverse effect showing. Justice Marshall, dissenting from denial of certiorari, wrote, "This Court has never squarely resolved the question whether proof of adverse effect is required . . . ." *Bonin* v. *California*, 494 U. S. 1039, 1043 (1990). He found *Sullivan* unclear and *Wood* and *Strickland* "at odds." *Ibid.* The Ninth Circuit subsequently agreed that an adverse effect was required. *Bonin* v. *Calderon*, 59 F. 3d 815, 825 (1995), cert. denied, 516 U. S.1051 (1996).

If there was doubt in 1990, it appears to have disappeared by 1994. In *Burden* v. *Zant*, 510 U. S. 132 (1994) (*per curiam*), the public defender had concurrently represented both Burden and the principal witness against him and obtained immunity for the witness. See *Burden* v. *Zant*, 498 U. S. 433, 434-435 (1991) (*per curiam*). This Court twice summarily reversed the



Eleventh Circuit for failure to properly credit the state court factual finding on immunity. The second time, the remand order directed the lower courts "to determine whether Mr. Kondritzer's representations created 'an actual conflict of interest *adversely affect[ing]* [his] performance.' *Cuyler* v. *Sullivan*, 446 U. S. 335, 350 (1980)." 510 U. S., at 134 (emphasis added, alterations in *Burden*).

If we are to infer controlling standards from remand orders in unargued cases, the inference from *Burden* is stronger than the inference from *Wood*. First, *Burden* is the later decision. Second, *Burden* expressly states the requirement, while *Wood* merely omits mention of an element which was unlikely to be separately contested.

A survey of the legal landscape shows that the interpretation of precedents *most* favorable to petitioner's position is the one expressed by Justice Marshall: that *Wood* is "at odds" with later cases and the issue has not been "squarely resolved." The alternate interpretation is that *Wood* is not as broad as its footnote might be read, is limited by the facts of the case, has minimal precedential value as a decision on an unbriefed, unargued point, and is flatly contradicted by later authority. Any contention that petitioner's claimed rule is dictated by precedent within the meaning of the *Teague* line of cases is patently without merit.

## IV. When the holding of a Supreme Court precedent, by its terms, is contrary to a proposed rule, the latter rule is *per se* "new," notwithstanding the nuances of other cases.

When Justice Harlan first proposed the rule that is now *Teague*, he acknowledged that it would sometimes be difficult to determine whether a rule is really "new." See *Desist* v. *United States*, 394 U. S. 244, 263 (1969) (dissenting opinion). Occasionally it is, but often it is quite straightforward. When the Court overrules a precedent on point, the rule of the overruling case is "new" beyond question. See *Butler* v.

*McKellar*, 494 U. S. 407, 412 (1990). *Amicus* submits that a second class of categorically "new" rules can be defined. That is, when the holding, not dictum, of a case states a rule of law, a proposal to make an exception to that rule or give it a lesser scope than it has on its face is a proposal for a new rule.

– A somewhat analogous principle can be found in the rule regarding application of this Court's precedents by lower courts. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). Similarly, if a rule stated by this Court is to be narrowed so as to have a smaller scope than originally stated, it is for this Court alone to make that limitation.

*O'Dell* v. *Netherland*, 521 U. S. 151 (1997) employed a principle similar to the one we suggest. At the time O'Dell's conviction became final, *California* v. *Ramos*, 463 U. S. 992 (1983) and *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) appeared to have established a general rule that giving the jury accurate information about postsentencing proceedings, including appeal, clemency, and parole, was a policy choice the states could make either way. See 521 U. S., at 163-164. Then, in *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), "the Court carved out an exception to the general rule described in *Ramos* by, for the first time ever, requiring that a defendant be allowed to inform the jury of postsentencing legal eventualities." *O'Dell*, *supra*, at 166. Prior to *Simmons* itself, failure to predict that such an exception would be carved out of the general rule could not be deemed unreasonable, and hence *Simmons* was a "new rule." *Ibid.*

The Court of Appeals panel, in effect, read *Wood* as carving out an exception to *Sullivan*'s adverse effect requirement merely by omitting any discussion of the requirement. *Mickens* v. *Taylor*, 227 F. 3d 203, 210-211 (CA4 2000). That inference



would be shaky enough if the line of cases ended at *Wood*, but it becomes particularly suspect in light of *Burger*'s invocation of the requirement in a case where the dissent asserted that the duty to inquire existed and had been breached, as well as *Burden*'s explicit requirement of adverse effect in its remand order.

The contention that *Sullivan*, *Strickland*, *Burger*, and *Burden* do not mean what they so clearly say brings to mind Justice Jackson's classic lament, now nearly half a century old yet as timely as the day it was written. "Whatever has been intended, this Court has also generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles." *Brown* v. *Allen*, 344 U. S. 443, 535 (1953) (opinion concurring in the judgment).

*Teague* and the corresponding rule of § 2254(d) share the common goal of enhancing finality by limiting the drastic remedy of collateral attack on final judgments to those claims that are based on clear violations of existing rules. See *Butler* v. *McKellar*, 494 U. S. 407, 413-414 (1990); *Williams* v. *Taylor*, 529 U. S. 362, 404 (2000) (intent of Congress to limit); *Williams*, at 410-411. To achieve this goal, courts and counsel must be able to rely on the general rules as stated by this Court unless and until this Court *expressly* carves out an exception. *Sullivan*, *Strickland*, *Burger*, and *Burden* on their face state a general rule applicable to all claims of attorney conflict to which no objection was made at trial. If an exception is to be made, it must be made on direct review in a case postdating *Burger* and *Burden*. Until then, any proposal for such a rule is *per se* "new."

## CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit should be affirmed.

September, 2001

Respectfully submitted,

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